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In The

Supreme Court of the United States

October Term, 1995

SIGRID CHASE, DEBORAH CLEYMAN, JUDY GORDON, SULEMA R. VILLARREAL, ELVIRA HERRERA, SUSAN JEAN PRICE, SYLVIA GARZA, individually and in their representative capacities; BARBARA KNUTSON, DAVID EDWARD PEREZ, JOSEPH MANUEL PEREZ, JOHN PAUL PEREZ, DANIEL RICHARD PEREZ, individually; and ESTHER PEREZ, as next friend and guardian of JAMES PEREZ, a minor,

Petitioners,

vs.

LOCKHEED CORPORATION and GENERAL ELECTRIC CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE GOVERNMENT CONTRACTOR DEFENSE FORMULATED IN *BOYLE V. UNITED TECHNOLOGIES* SHIELDS A SUPPLIER OF MILITARY EQUIPMENT FROM LIABILITY FOR INJURIES AND DEATH CAUSED BY A DEFECT IN A COMPONENT PART OF THE EQUIPMENT WHERE (1) THE GOVERNMENT DID NOT SUBSTANTIVELY EVALUATE AND THEREAFTER APPROVE THE PARTICULAR FEATURE OF THE COMPONENT CLAIMED TO BE DEFECTIVE; (2) THE SUPPLIER ALTERED THE COMPONENT PART MANUFACTURER'S ORIGINAL DESIGN, WHICH COMPLIED WITH THE APPLICABLE SPECIFICATIONS, WITHOUT INFORMING THE GOVERNMENT OR THE COMPONENT PART MANUFACTURER; AND (3) THE GOVERNMENT'S KNOWLEDGE OF THE COMPONENT'S PHYSICAL CONFIGURATION DID NOT EQUATE TO KNOWLEDGE OF THE SUPPLIER'S DESIGN ALTERATION AND THE RISK POSED THEREBY.

II. WHETHER THE CHOICE AND APPLICATION OF GEORGIA LAW TO PETITIONERS' TORT CLAIMS ARISING OUT OF AN AIRCRASH OUTSIDE OF GEORGIA IS FUNDAMENTALLY UNFAIR AND VIOLATES DUE PROCESS WHERE PETITIONERS AND THEIR DECEDENTS HAD NO CONTACTS WITH GEORGIA AND EVEN GEORGIA COURTS WOULD NOT HAVE APPLIED GEORGIA SUBSTANTIVE LAW HAD SUIT BEEN BROUGHT THERE.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed are as follows:

Veda Bradshaw
James W. Chase
Sigrid Chase
Deborah Cleyman
Alicia Galvan
Lorenzo Galvan
Laquinta Gardner
Samuel Gardner, Sr.
Sylvia Garza
General Electric Corporation
Judy Gordon
Elvira Herrera
Barbara Knutson
Glynda Knutson
Lockheed Corporation
Gloria Mendoza
Daniel Richard Perez
David Edward Perez
Esther Perez
James Perez
John Paul Perez
Joseph Manuel Perez
Olga Perez
Susan Jean Price
Veronica Sheffield
Sulema R. Villarreal
Ofelia Wilson

LIST OF PARTIES – Continued

Petitioners are unaware of any parent or subsidiary company of any party to be listed. Petitioners defer to Respondents Lockheed Corporation and General Electric Corporation on this point.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Court of Appeals' opinion is reported at 81 F.3d 570, and is reproduced in the appendix filed herewith ("App.") at App. 1-18. The Court of Appeals' amended opinion which denied the petition for rehearing is reported at 88 F.3d 340, and is reproduced at App. 21-23. The unreported opinion of the district court which is particularly pertinent to this petition is reproduced at App. 24-33.

STATEMENT OF JURISDICTION

The Court of Appeals' opinion was entered on April 29, 1996. The amended opinion denying the petition for rehearing was entered on July 5, 1996. Petitioners timely invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of Amendment 14 to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

(i) Overview of Proceedings Below

On August 29, 1990, a United States Air Force C-5A Galaxy aircraft crashed within seconds after takeoff at Ramstein Air Base, Germany. Thirteen of the seventeen servicemen aboard the aircraft were killed. Representatives of eleven of the deceased servicemen and one serviceman who survived the crash, some of whom are Petitioners herein, filed lawsuits in the Texas and Florida state courts seeking damages from Respondents Lockheed Corporation ("Lockheed") and General Electric Corporation ("GE") under Texas products liability law. (App. 4-5). Petitioners contended that the crash was caused by the uncommanded and inadvertent deployment of the thrust reverser on one of the aircraft's four engines shortly after takeoff. (App. 5).

The lawsuits were removed by Respondents to federal district court in Texas and Florida on diversity jurisdiction grounds. (App. 6). Subject matter jurisdiction was proper under 28 U.S.C. § 1332. Pursuant to motions filed by Respondents, the Judicial Panel on Multidistrict Litigation transferred the cases to the Western District of Texas for pretrial proceedings since most of the plaintiffs were Texas residents and many relevant documents and witnesses were located at Kelly Air Force Base in Texas,

where the crash "aircraft was modified and maintained." (App. 6; R. 2986).

District Judge Morey Sear held that Georgia law governed the liability issues in the consolidated cases because the C-5A was designed, manufactured, and delivered to the Air Force in Georgia. (App. 6). Judge Sear thereafter granted summary judgment for Respondents, holding that Petitioners' claims were extinguished by Georgia's products liability statute of repose. (App. 6-7). Judge Sear never ruled on Respondents' alternative ground for summary judgment, the "government contractor defense" set forth in *Boyle v. United Technologies*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988).

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed. The court held that (1) all of Petitioners' claims, except the "failure to warn" claim, were barred by government contractor immunity; (2) Georgia law governed the failure to warn claim; and (3) Respondents had no duty to warn the Air Force about the danger posed by the circuit design on the facts of this case. (App. 8-19). On rehearing, the court held that Respondents also had no duty to warn the pilots of the aircraft because the Air Force was a "learned intermediary." (App. 21-23).

(ii) Facts

A. The Defect

The C-5A which crashed was being used in support of the Persian Gulf War's Operation Desert Storm. The C-5A was manufactured by Lockheed in Georgia under

contract with the Air Force. GE designed and manufactured the aircraft's engines, including the thrust reversers, in Ohio. (App. 2-3).

The evidence was that the C-5A crashed because of an uncommanded and undetected deployment of a thrust reverser on one of the two engines on the left side of the aircraft. Petitioners presented expert testimony that the improper design and assembly of certain pylon[1] components created a single point electrical failure on takeoff, leading to an inadvertent deployment of a thrust reverser which could not be detected by the aircraft's crew. Specifically, the ground wires for both the thrust reverser enunciator (operating) circuit and the thrust reverser indicator (warning) circuits were terminated to the same grounding stud. The district court noted that if the "single point malfunctioned, the thrust reverser system could remain in an unlocked position [during takeoff] without the crew being aware of it which could in turn lead to an uncommanded deployment of the system," and that the crash "may have been caused by the design of the single ground point." (R. 2604-06).

The evidence furthermore showed that GE had originally designed the thrust reversers with two separate grounds for the thrust reverser enunciator and indicator circuits. (R. 947-48). This dual ground design was chosen precisely to avoid a single point failure and its hazardous consequences – a flight crew totally unaware that a thrust reverser was in an unlocked position during takeoff. (R. 948; S.R. 358-60). Lockheed, however, altered GE's design

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[1] The pylon attaches the engine to the wing.

(without telling either GE or the Air Force) and attached the ground wires for the two circuits to a single grounding stud when it assembled the crash aircraft and other C-5A's.[2]

(S.R. 358-60, 366).

B. The Modification

In 1978, the Air Force complained to Lockheed that the location of the pylon components on C-5A's was contributing to maintenance and overhaul problems. (App. 3). Pursuant to the Air Force's request, Lockheed presented a proposal for the modification of the four engine pylons on all C-5A's in service. This proposal, Engineering Change Proposal ("ECP") 7054, involved the redesign of the C-5A's engine pylons, moved and rerouted various conduits, including thrust reverser systems, and replaced original components, filters, bus bars, wire terminals and grounding studs. (App. 3). Lockheed thereafter designed and made a kit that the Air Force used to retrofit the pylons on all C-5A's. As part of its assembly of these kits, Lockheed (again) placed the two connections for the ground wires for the thrust reverser enunciator and indicator circuits on the same grounding stud, contrary (again) to GE's original design. (App. 3; R. 2604, 2605).

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[2] As will be discussed below, GE asserts that it first learned that Lockheed had altered its design *after* the crash occurred in 1990. Moreover, the Air Force ordered a redesign of this electrical system when it too first learned of the hazardous condition after the accident.

C. Texas' and Georgia's contacts for choice-of-law

Eleven of the twelve deceased/injured servicemen represented in the consolidated actions were domiciled and resided in Texas. The vast majority of plaintiffs bringing actions as beneficiaries/survivors under the Texas Wrongful Death Act and Survival Statute were likewise Texas residents. None of the decedents or plaintiffs are Georgia residents or have any contacts or connection with Georgia. Neither Lockheed nor GE is incorporated in Georgia and both conduct major business activities in Texas and have registered agents there for service of process. Directly pertinent to the sale and maintenance of the C-5A, Lockheed had a technical representative based at Kelly Air Force Base in Texas during all times material to the history of the C-5A aircraft, and Lockheed engineering personnel were in attendance in connection with the installation of the pylon kits in Texas. The C-5A aircraft underwent heavy depot-level maintenance in Texas and it was from Texas that the Air Force lodged complaints to Lockheed about the configuration of the pylon components that led to the issuance of ECP 7054. Further, Lockheed delivered the prototype kit directly to the Air Force in Texas. Georgia's only contact is that it was the place where Lockheed designed, manufactured and sold the C-5A and replacement pylon kits to the Air Force. GE designed and manufactured the component engines and thrust reverser systems in another state and GE has no place of business in Georgia. The C-5A was principally used, maintained and hangared outside of Georgia.

D. The government contractor defense

Respondents moved for summary judgment on grounds which included the government contractor defense. Respondents relied on the affidavits of Lockheed's manager of military contracts and another Lockheed employee. These affidavits generally outline the Air Force's involvement with the development, production, and procurement of the C-5A aircraft; neither affidavit, however, specifically addressed the thrust reverser's single point ground feature which is the product defect challenged by Petitioners. (App. 10-11; R. 1288-1305). On that point, Respondents submitted the deposition testimony of Air Force engineer Henry Fraser, who stated that Air Force engineers involved in the development and implementation of ECP 7054 (years after the USAF took delivery of the crash aircraft) knew that the two wires terminated to a single grounding stud. (App. 12-13).

Petitioners opposed summary judgment with evidence that the electrical system installed by Lockheed violated its own and government specifications, as well as applicable Federal Aviation Regulations. ("FAR"). For example, Lockheed Specification No. 41060 set the performance, operational, design, and contractual requirements under which the C-5A thrust reverser system was built. This specification incorporated virtually all of the safety requirements set forth in other specifications and the applicable FAR's, and furthermore provided that:

a. The basic fail-safe philosophy for the entire T/R subsystem . . . shall be that *more than two unrelated failures or malfunctions occur*

before the thrust reverser will extend or retract inadvertently. (R. 1535; S.R. 343).[3]

Testimony from key *GE* employees established that: (1) GE originally designed the thrust reverser electrical circuitry with *separate grounds* for the enunciator and indicator circuits; Lockheed nevertheless installed the GE-designed system so that both circuits were attached to the *same* grounding stud; GE first learned that Lockheed altered the original design *after* the accident occurred; two wires attached to the same grounding stud creates the potential for a *single point failure;* and Lockheed's attachment of the two wires to one ground *violated* the requirements of Specification 41060. (App. 34-45).

What's more, Petitioners presented evidence that, after the crash, the Air Force undertook to redesign the electrical system and issued warnings to C-5A pilots and flight crews to ensure that inadvertent and undetected deployment of the thrust reverser would not occur. (R. 1539; S.R. 139, 485-86).

(iii) The Court of Appeals' Ruling

The Fifth Circuit held that Respondents had established all three conditions of the government contractor defense enunciated in *Boyle,* 487 U.S 500. According to the court, the first condition (governmental approval of reasonably precise specifications) was met because Respondents and the Air Force "worked closely together, on the development of the C-5A from its planning stages to its

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[3] Throughout this Petition, all emphasis has been supplied by counsel.

full production," and Air Force personnel "inspected and supervised every aspect of the production of the C-5A." (App. 10-11). The second condition (conformance to those specifications) was met because "Air Force inspectors were present and actively involved throughout the design, review, development and testing of the C-5A," and the "Air Force accepted and has used the C-5A for over 20 years without any significant problems." (App. 11-12). The third condition (warning of dangers not known to the government) was met because the Air Force, as a result of ECP 7054, had knowledge of the electrical circuit's physical configuration and "had to have seen the stud and been aware of its design." (App. 12-13). The court thus held that Petitioners' design defect claims were barred by government contractor immunity. (App. 13).

The court also ruled that a "failure to warn" claim which is distinct from a design defect claim is not defeated by the government contractor defense unless "the Government was involved in the decision to give, or not to give, a warning." (App. 13-14). Without such governmental involvement, the court reasoned, the defendant cannot establish the "significant conflict between the federal interest or policy and the operation of state law" which must be shown before the government contractor defense will shield a defendant from liability. (App. 13-14).

The court did not determine whether Petitioners' failure to warn claim survived the government contractor defense, however, finding instead that the record did not disclose whether or not Respondents and the Air Force had discussions about warnings. (App. 14). The court

thus addressed the choice of law issue and the Respondents' potential liability for failure to warn under the appropriate substantive law.

The court ruled that Georgia law should apply here because, in the court's view, "[v]irtually all of the relevant conduct complained of took place in Georgia," and Georgia "thus has the strongest interest in applying its law to businesses that design, manufacture, and sell products into its stream of commerce." (App. 17-18). The court then concluded that, under Georgia law, Respondents had no duty to warn the Air Force because the Air Force knew of the danger posed by the circuit design. (App. 18). On rehearing, the court amended its opinion to state that Respondents had no duty to warn the pilots of the C-5A which crashed because the Air Force was a "learned intermediary." (App. 22-23).

REASONS FOR GRANTING THE WRIT

In *Boyle v. United Technologies*, 487 U.S. 500 (1988), this Court recognized the government contractor defense and rooted that defense in the United States' immunity from suit for discretionary decisions. The Fifth Circuit's holding in this case is at odds with *Boyle*, *Boyle's* theoretical underpinnings, and subsequent decisions from the lower courts since the defense was deemed applicable here as a matter of law even though there was no evidence that the Air Force actually substantively evaluated and approved the particular design feature at issue in this case, and the Air Force was never told that the contractor had altered the original design of the challenged component which

complied with governing specifications. Moreover, the Fifth Circuit's decision in this case sets dangerous precedent since it appears to immunize a contractor from liability under state law upon mere proof that the United States had significant involvement with the development of a particular product in general, or that a governmental employee came to know of the product's physical configuration. Surely, this was not this Court's intent when *Boyle* was handed down, and the Fifth Circuit's decision accordingly should be overturned.

An independent and equally compelling reason for this Court to grant the writ is to remedy the denial of due process from the choice and application of Georgia law to Petitioners' negligence and product liability claims. The Fifth Circuit's choice of law of a state with which the Petitioners and their decedents had no contacts or connection whatsoever was grossly unfair and contrary to the parties' reasonable expectations and requires reversal of the judgment. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). Moreover, Georgia adheres to the *lex loci delicti* doctrine and has disavowed any "state interest" in having its substantive law applied to an extraterritorial aircrash. In a perverse twist of irony, had Petitioners filed suit in Georgia, where Respondent Lockheed manufactured and sold the defective C-5A, Georgia substantive law would *not* have been applied. Given the unfair surprise and Georgia's lack of any "legislative jurisdiction" over the Petitioners, the choice of Georgia law and judgment based thereon cannot stand.

I.

THE DEFENSE FORMULATED IN *BOYLE* DOES NOT SHIELD A SUPPLIER OF MILITARY EQUIPMENT FROM LIABILITY FOR INJURIES AND DEATH CAUSED BY A DEFECT IN A COMPONENT PART OF THE EQUIPMENT WHERE (1) THE GOVERNMENT DID NOT SUBSTANTIVELY EVALUATE AND THEREAFTER APPROVE THE PARTICULAR FEATURE OF THE COMPONENT CLAIMED TO BE DEFECTIVE; (2) THE SUPPLIER ALTERED THE COMPONENT PART MANUFACTURER'S ORIGINAL DESIGN, WHICH COMPLIED WITH THE APPLICABLE SPECIFICATIONS, WITHOUT INFORMING THE GOVERNMENT OR THE COMPONENT PART MANUFACTURER; AND (3) THE GOVERNMENT'S KNOWLEDGE OF THE COMPONENT'S PHYSICAL CONFIGURATION DID NOT EQUATE TO KNOWLEDGE OF THE SUPPLIER'S DESIGN ALTERATION AND THE RISK POSED THEREBY.

The Fifth Circuit's opinion unduly expands the defense formulated by this Court in *Boyle*, 487 U.S. 500, at the expense of those who clearly deserve better – men and women who serve in our nation's armed forces, and their loved ones. In *Boyle*, this Court ruled that contractors who supply the United States with military equipment should, under limited circumstances, be immunized from liability for the breach of duties imposed by state tort law. The "government contractor defense" will displace tort liability under state law "only where . . . a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law. . . . ' " *Id.* at 507 (citation omitted). This Court thus held that liability for design defect cannot be imposed under state law where (1) the United States approved

reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the contractor warned the United States about the dangers in the use of the equipment known to the contractor but not to the United States. *Id.* at 512.

The policy justification for the defense enunciated in *Boyle* is that "selection of the appropriate design for military equipment to be used by our Armed Forces" is a discretionary decision for which the Government would be immune from suit by virtue of the Federal Tort Claims Act's discretionary function exception. *See* 28 U.S.C. § 2680(a). 487 U.S. at 511. This Court reasoned that permitting state tort liability would "produce the same effect sought to be avoided" by the discretionary function exception since the financial burdens resulting from such liability would "ultimately be passed through . . . to the United States" by contractors who would "raise their prices to cover . . . contingent liability for Government-ordered designs." *Id.* at 511-512.

The Fifth Circuit here unnecessarily strayed from *Boyle* and the theoretical underpinnings of that case. The court concluded that Respondents had met their summary judgment burden on *Boyle's* first condition with the evidence that Respondents and the Air Force worked closely together on the development of the C-5A from the planning stage to its full production and that Air Force personnel inspected and supervised all aspects of the production of the C-5A. The court missed the mark in its analysis because governmental exercise of discretion – the very basis for the government contractor defense – cannot be established without proof that the Air Force

substantively reviewed and thereafter approved the *particular* design feature claimed to be defective. *Id.* at 512 (the first two elements of the government contractor defense "assure that the *design feature in question* was considered by a Government officer, and not merely by the contractor itself."); *see Tate v. Boeing Helicopters*, 55 F.3d 1150, 1154 (6th Cir. 1995) (defense not available unless the government in fact made a *"judgment as to the particular feature"* in question).

In the present case, Respondents presented no evidence that the Air Force substantively reviewed and approved the single point ground feature which Lockheed assembled after GE had designed a dual ground mechanism in order to comply with specifications. The Fifth Circuit's holding that Respondents established that the Air Force approved reasonably precise specifications with evidence that the Air Force was significantly involved in the development of the C-5A *in general* cannot be squared with *Boyle* and subsequent decisions from the lower federal and state courts. *See Grispo v. Eagle-Picher Industrs.*, 897 F.2d 626, 632 (2d Cir. 1990) ("Stripped to its essentials, the military contractor defense under *Boyle* is to claim, *'The Government made me do it.' Boyle* displaces state law only when the Government, making a discretionary, safety-related military procurement decision contrary to the requirements of state law, incorporates this decision into a military contractor's contractual obligations, thereby limiting the contractor's ability to accommodate safety in a different fashion"); *Augustine v. Bell Helicopter Textron*, 922 S.W.2d 287, 290 (Tex. App. 1996) (summary judgment denied despite evidence that "the Air Force approved reasonably precise specifications

regarding the general design of the helicopter" because there was a fact dispute on whether the Air Force approved reasonably precise specifications for "the allegedly defective main driveshaft system"); *Gray v. Lockheed Aeronautical Systems*, 880 F.Supp. 1559, 1567 (N.D. Ga. 1995) (defense deemed not applicable despite evidence that Lockheed and the Navy had "a close working relationship . . . during the overall design and creation of the S-3" aircraft which crashed, the Navy conducted various reviews, audits, and tests of the aircraft, and the Navy accepted the aircraft: Lockheed "produced no evidence that the Navy reviewed and approved specific engineering drawings of the servo [which allegedly was defective] during any of these events"); *Bardwell v. George Sharp, Inc.*, 1995 W.L. 386894 *7 (E.D. La. June 28, 1995) (government contractor defense will be applied only where the "contractor's defective design has been approved by the government, as a matter of public policy, following a thorough review in which the defective design received full government consideration").

Likewise unfaithful to *Boyle* is the Fifth Circuit's conclusion that *Boyle's* second condition was met because the Air Force was closely involved in the production of the C-5A and accepted and used the C-5A for a number of years before the accident occurred. Evidence supplied by *GE* established that it designed the system with separate grounds for the enunciator and indicator circuits in order to preclude the single point failure which occurred here. (App. 34-45). The letter from GE's representative to the Air Force in response to the Air Force's request for input on the post-crash modification of the electrical system speaks volumes on this point:

> As you are undoubtedly aware, the proposed modifications address aspects of the Thrust Reverser System that *were not originally designed by [GE].*
>
> * * *
>
> *[GE] recommends that SAALC provides a separate ground for the Thrust Reverser System indication lights, i.e., split the common ground.* In fact, *[GE] designed the system with separate grounds;* thus provisions for separate grounds are already available in the existing Thrust Reverser wiring harness. *Splitting the common ground would preclude a single point failure mechanism and provide the desired redundant warning system.* (App. 44-45).

For whatever reason, Lockheed, without telling GE or the Air Force, assembled the system and attached the wires for the enunciator and indicator circuits to a single ground stud. Witnesses from GE furthermore testified that Lockheed's installation violated Specification 41060, which expressly provided that "more than two unrelated failures or malfunctions [must] occur before the thrust reverser will extend or retract inadvertently."

The Fifth Circuit concluded that the specifications Petitioners relied upon to oppose summary judgment related only to "general design specification[s] . . . not contemplated by the first element of the *Boyle* test because '[o]nly the detailed, quantitative specifications – and not those calling for such vagaries as a failsafe, simple, or inexpensive product – are relevant to the government contractor defense.' " (App. 11) (quoting *Kleeman v. McDonnell Douglas Corp.*, 890 F.2d 698, 703 (4th Cir. 1989), *cert. denied*, 495 U.S. 953 (1990)). Petitioners submit

that this holding finds absolutely no support in *Boyle* and is furthermore belied by the unrefuted evidence that GE designed the electrical system with separate grounds precisely to comply with Specification 41060 and to prevent a single point ground failure. Under these circumstances, a governing contract document such as Specification 41060, which undoubtedly is detailed and quantitative, can hardly be characterized as merely precatory or general and thus entirely irrelevant to the contractor immunity inquiry. At the very least, this Court should grant certiorari review in this case to flesh out the contours of this aspect of *Boyle*.

The Court of Appeals also held that Respondents established *Boyle's* third condition because ECP 7054 did not change the single point ground feature and Air Force engineers involved in this modification years after the Air Force took delivery of the C-5A "had to have seen the stud and been aware of its design." (App. 13). This interpretation of *Boyle* all but nullifies *Boyle's* final requirement for immunity from state tort liability.

This Court in *Boyle* mandated that contractors warn the United States of dangers in the use of the equipment not known to the United States "lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the *discretionary decision*." *Boyle*, 487 U.S. at 512-513; *see Tate*, 55 F.3d at 1156 ("the third condition of *Boyle* . . . encourages contractors to provide the government with *all information* required to soundly exercise its *discretion*").[4]

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[4] *See also Ritch v. A.M. General Corp.*, 1996 W.L. 310297 *2 (D.N.H. Mar. 28, 1996) ("The third condition was adopted to

Boyle's third condition, like the first two, plainly is animated by the Court's concern that military contractors not be held liable for judgment calls which are properly viewed as having been made by the United States. The United States, however, cannot exercise discretion unless "the contractor has *fully conveyed all information* necessary to allow the government to make a *fully informed decision.*" *Butler v. Ingalls Shipbuilding*, 89 F.3d 582, 584 (9th Cir. 1996).

Surely, this Court in *Boyle* did not intend to immunize a contractor from liability under state law whenever an employee of the United States merely acquires knowledge of a product's physical configuration. This is, however, exactly what the Fifth Circuit has held. To establish such immunity, Petitioners submit, the contractor must, at a minimum, prove "that the government was aware not only of the design, but also of the risks." *Stecyk v. Bell Helicopter Textron*, 1996 W.L. 153555 9 n. 7 (E.D. Pa. April 1, 1996). Furthermore, the evidence was that Lockheed never informed the Air Force, prior to the crash of the C-5A, that it had altered GE's original dual ground design, nor was the Air Force told that the single point ground configuration which Air Force engineers observed during ECP 7054 deviated from GE's original design and also violated the safety specifications. That the Air Force's failure to object to Lockheed's attachment

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encourage manufacturers to pass along their knowledge of any risks, thereby *increasing the flow of information* available to the government in making its *discretionary decisions*"); *Feldman v. The Kohler Co.*, 918 S.W.2d 615, 625 (Tex. App. 1996) ("the contractor must warn the government of dangers such that the government may make an *informed choice*").

of the two wires to the same grounding stud was not a fully informed, discretionary, decision is only underscored by the Air Force's actions after the crash, when it ordered that warnings regarding uncommanded and inadvertent deployment of thrust reversers be given to C-5A pilots and crews pending the redesign of the flawed electrical circuitry. (R. 1539; S.R. 139, 485-486).

In sum, the tragic loss of life in this air disaster case could have been avoided had Lockheed simply adhered to GE's original design and used the two grounding studs which were readily available. Lockheed's failure to do so does not in any way represent an informed exercise of judgment and discretion by the Air Force. Consequently, the Fifth Circuit erroneously concluded that the defense set forth in *Boyle* barred Petitioners' design defect claims.

II.

THE CHOICE AND APPLICATION OF GEORGIA LAW TO PETITIONERS' TORT CLAIMS ARISING OUT OF AN AIR CRASH OUTSIDE OF GEORGIA IS FUNDAMENTALLY UNFAIR AND VIOLATES DUE PROCESS WHERE PETITIONERS AND THEIR DECEDENTS HAD NO CONTACTS WITH GEORGIA AND EVEN GEORGIA COURTS WOULD NOT HAVE APPLIED GEORGIA LAW HAD SUIT BEEN BROUGHT THERE.

The choice of Georgia substantive law in this case is grossly unfair and violates Petitioners' rights under the Due Process Clause of the Fourteenth Amendment. The Fifth Circuit's ruling that "the district court correctly concluded that Georgia law should apply" to Petitioners'

claims disregards the "constitutional constraints"[5] on choice of law under state conflicts rules. (App. 15-18). The lower courts' holdings directly collide with decisions of this Court mandating that choice of substantive law not be fundamentally unfair and contrary to the reasonable expectations of the parties. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-822, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Hartford Accident & Indem. Co. v. Delta Pine Land Co.*, 292 U.S. 143, 149, 54 S.Ct. 634, 78 L.Ed. 1178 (1934); *Home Ins. Co. v. Dick*, 281 U.S. 397, 402-410, 50 S.Ct. 338, 74 L.Ed. 926 (1930).

> A choice-of-law decision that frustrates the justified expectations of the parties can be fundamentally unfair. This desire to prevent unfair surprise to a litigant has been the central concern in this Court's review of choice-of-law decisions under the Due Process Clause.

Allstate Ins. Co. v. Hague, 449 U.S. 302, 327, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) (Stevens, J., concurring in judgment).

In this case, given the complete absence of any contacts between Georgia and the Petitioners or their decedents, the application of Georgia law to the wrongful death and personal injury claims could not be any more unfair or unexpected. None of the decedents or beneficiaries were residents of Georgia; none invoked the laws of Georgia or claimed any Georgia common law or statutory

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[5] The lower courts applied the "Most Significant Relationship" test set forth in Sections 6 and 145 of the Restatement (Second) of Conflict of Laws ["Rest."] adopted in both Texas and Florida, the forum states.

rights; none entered or committed any actions within Georgia territorial boundaries or entered into any contracts with Georgia citizens; none consented to Georgia state legislative or judicial jurisdiction or requested that Georgia law govern their rights; none filed a cause of action in a Georgia court or in any way utilized Georgia judicial resources; and none had any expectation whatsoever that Georgia law could control or abrogate their causes of action for injuries sustained in an aircrash outside of Georgia.

Without question, the choice of Georgia law worked a markedly unfair surprise on the Petitioners. Petitioners and their decedents not only lacked "minimum contacts" with Georgia, they lacked any contacts at all. This Court has never sanctioned the choice of law of a state to which the adversely affected parties had no connection. To the contrary, the adversely affected parties' contacts with the chosen forum have been critical to the Court's prior due process determinations. *See Allstate*, 449 U.S. at 317-318 (upholding choice of Minnesota law where adversely affected party was at all times present and doing business in Minnesota); *Home*, 281 U.S. at 402-410 (finding application of Texas law violative of due process where adversely affected Mexican insurer and New York reinsurer had no connection to Texas). Lower courts addressing the constitutional limitations on choice of law have likewise noted these essential party contacts. *See In re San Juan Dupont Plaza Hotel Fire Litig.*, 745 F. Supp. 79, 84 (D. P.R. 1990) ("Parties cannot be bound by the laws of states which have no interest in the controversy *or to which they have no contacts.*").

Certiorari review in this case would also allow this Court to give much needed clarification on the relationship between, and party contacts necessary for, choice of law and "legislative jurisdiction." The text writers and legal commentators, who have been almost solely responsible for developing the various conflicts theories adopted by the states, have long recognized that it is unconstitutional to choose the law of a state which lacks legislative jurisdiction over the objecting party. *See* George, "Choice of Law Outline for Texas Courts," 18 Tex. Tech L. Rev. 785, 790-91, 795 (1987) ("Legislative jurisdiction governs all choice of law problems. . . . This minimal connection is similar to the minimum contacts requirement for judicial jurisdiction over nonresident defendants."); R. Leflar, L. McDougal & R. Felix, *American Conflicts Law* § 55, p.163 (4th ed. 1986) ("In conflict of laws, [legislative jurisdiction] has come to define the outer limits to which a court or a legislative directive may go, and beyond which it may not go, in choosing what state's law (whether statutory or judge-made) is to be applied to any given set of facts.").

The Fifth Circuit's decision simply ignores that Georgia cannot exercise legislative jurisdiction over the Petitioners or their decedents who have no connection to Georgia and thus the application of its law to their tort claims must be deemed unconstitutional. *See* E. Scoles & P. Hay, *Conflict of Laws* § 3.27[4], p.13 (1988 Supp.) ("It is unfair to exercise jurisdiction when the person has no contact with the State. Fairness and the significance of contacts are measured by purposeful activity directed to the [state] or by the type and quantum of benefits derived from the state seeking to exercise power."). If Georgia

itself has no power to directly affect the rights of Petitioners or their decedents, another state should hardly be allowed to make an end-run around the Constitution through choice-of-law. Indeed, as is the case with "judicial jurisdiction," the Constitution should demand that a state's contacts with the adversely affected party for choice of law purposes be *equal to or greater* than for purposes of exercising legislative jurisdiction. *See* Posnak, "The Court Doesn't Know its Asahi from its Wortman: A Critical View of the Constitutional Constraints of Jurisdiction and Choice of Law," 41 Syracuse L. Rev. 875, 876 (1990); Silberman, "Shaffer v. Heitner: End of an Era," 53 N.Y.U.L. Rev. 33, 88 (1978).

Clarification on these matters is greatly needed. In an effort to limit or completely absolve themselves of liability, defendants in product liability actions regularly seek application of the law of a foreign jurisdiction to which the plaintiffs have absolutely no connection. Foreign manufacturers from all corners of the earth flood state consumer markets with their goods. Where innocent users or bystanders are injured by dangerous products, they surely have no expectation that the manufacturers can hide behind the law of a foreign jurisdiction (perhaps half way around the world) in which the injured party has never even stepped foot. *See Allstate*, 449 U.S. at 333 (Powell, J., dissenting) ("The touchstone here is the reasonable expectation of the parties."). Further, as a matter of policy, were the place of product manufacture a constitutionally sufficient nexus for choice of law in personal injury actions, manufacturers would be encouraged to seek asylum in conservative jurisdictions. *Cf.* Rest. § 145, comment e ("The place where the defendant's conduct

occurred is of less significance where . . . a potential defendant might choose to conduct his activities in a state whose tort rules are favorable to him.").

Even putting aside that the choice of Georgia law was fundamentally unfair and contrary to the expectations of Petitioners and their decedents, Georgia, by continuing to adhere to the *lex loci delicti* doctrine, has made it abundantly clear that it has no "state interest" in having its law applied to actions arising out of an aircrash outside of Georgia.[6]

Had the Petitioners filed suit in Georgia, there is every indication that the substantive law of Georgia would *not* have been applied to their claims. *See, e.g., Yates v. Lowe*, 348 S.E.2d 113, 113 (Ga. App. 1986) ("Under Georgia law the *lex loci delicti* determines the substantive rights of the parties in airplane crash cases."). Georgia's own disavowal of any state interest in having its law applied to an extraterritorial aircrash should end the matter. *Cf.* Rest. § 145, comment e ("in judging a state's interest in the application of one of its local law rules, the forum should concern itself with the question whether the courts of that state would have applied this rule in the decision of the case. . . . the fact that these courts would not have applied this rule may indicate that no important interest of that state would be infringed if the rule were not applied by the forum"). In any event,

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[6] *See Allstate*, 449 U.S. at 307-320 ("[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.").

whatever governmental interest Georgia might have had dissipated when Respondents' products were principally used and maintained in another state and then caused injury to innocent victims while in the stream of commerce outside of Georgia.[7]

Moreover, given the Georgia courts' consistent application of the *lex loci delicti* test irrespective of where the defendant's wrongdoing occurred, Respondents could hardly claim they had a reasonable expectation that Georgia law would apply to an aircrash in another jurisdiction. In this regard, the district court's application of Georgia law and its statute of repose on the express basis of Respondents' justifiable expectations was completely unfounded. (App. 31). Georgia's statute of repose was not even enacted until many years *after* the C-5A at issue was designed and manufactured. Respondents clearly had no expectation that a non-existent Georgia law would govern an extraterritorial aircrash.[8]

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[7] The Fifth Circuit's opinion noted but failed to expressly examine the "constitutional constraints" on choice of law. The court concluded, however, that, because the thrust reverser's defective electrical system was manufactured and sold to the Air Force in Georgia, "Georgia has the strongest interest in applying its law to businesses that design, manufacture and sell products into its stream of commerce." (App. 17-18).

[8] *See, e.g., Jaurequi v. John Deere Co.*, 986 F.2d 170, 176 (7th Cir. 1993)("Nor can [defendant manufacturer] persuade anyone that it molded its behavior to conform to the requirements of an Indiana law enacted . . . three years after it had cast the Corn Head in the stream of commerce"); *Myers v. Hayes Intern. Corp.*, 701 F. Supp. 618, 619-25 (M.D. Tenn. 1988)(where plane crashes in Kentucky and products liability actions are brought in Tennessee which adheres to *lex loci* doctrine, Tennessee statute of repose is inapplicable).

The contacts between Georgia and Respondents alone created no such reasonable expectation and were constitutionally deficient. *See Soo Line Railroad Co. v. Overton*, 992 F.2d 640, 643-645 (7th Cir. 1993) (in wrongful death action filed in Minnesota arising out of extraterritorial accident, choice of Minnesota law violates due process even though defendant a Minnesota corporation).

Finally, the choice of Georgia law in this case works a significant adverse impact on the governmental interests of Texas whose law all Petitioners specifically invoked. *See Phillips*, 472 U.S. at 824 (Stevens, J., concurring in part and dissenting in part) ("potential impact of [choice of law] on the interests of other sovereign States and the fairness of [the] decision to the litigants should be separately considered"). Texas not only has a paramount interest in providing an adequate remedy for wrongful death and injury to its residents and those beneficiaries whose rights are derivative thereof, but in protecting them from dangerous and defective products especially where such products are used or maintained in Texas.[9] Texas provided Petitioners with negligence and products

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[9] *See, e.g., Huddy v. Fruehauf Corp.*, 953 F.2d 955, 958-60 (5th Cir.), *cert. den.*, 506 U.S. 828, 113 S.Ct. 89, 121 L.Ed.2d 52 (1992)("Texas has a strong commitment to protecting its residents from defective and dangerous products."); *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 250 (5th Cir. 1990) ("The Texas legislature and courts have developed an almost paternalistic interest in the protection of consumers and the regulation of conduct of manufacturers that have business operations in the state."); *Trailways, Inc. v. Clark*, 794 S.W.2d 479, 486 (Tex. App. 1990).

liability causes of action unimpeded by the confines of Georgia law.[10]

In this case, Texas was the critical cross-roads where the vast majority of the decedents and their beneficiaries resided and their estates were administered; where both Respondents did substantial business and had registered agents for service of process; where the very C-5A aircraft which would kill the servicemen underwent heavy maintenance and a significant modification; where Lockheed had a technical representative based and engineering personnel present in connection with the installation of the defective modified pylon kits; where the ECP 7054 retrofit kit was directly delivered; and where Respondents failed to warn of the dangers or defects associated with their products. Respondents knowingly subjected themselves to the legislative and judicial jurisdiction of Texas. Texas' contacts and interests were so overwhelming, of course, that the actions were consolidated and transferred to Texas on *Respondents'* request. The district court's and Fifth Circuit's subsequent choice of Georgia law to snuff out Petitioners' claims was perverse and unconstitutional

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[10] Texas law, for example, imposes an exacting duty to warn the ultimate users and employee-users of a product in addition to the employer-purchaser and limits the "learned intermediary" doctrine to the physician-patient relationship. *E.g., Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1091 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974); *Rolen v. Burroughs Wellcome Co.*, 856 S.W.2d 607, 609 (Tex. App. 1993); *Lopez v. Arco Corp.*, 584 S.W.2d 333, 335 (Tex. App. 1979). And, of course, Texas does not have a products liability statute of repose. (App. 29).

and certiorari should be granted to rectify this grave injustice.

CONCLUSION

Based on the facts and authorities set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX 1

In re AIR DISASTER AT RAMSTEIN AIR BASE, GERMANY, on 8/29/90, Plaintiff.

Olga PEREZ, etc., et al., Plaintiffs-Appellants,

v.

LOCKHEED CORP. and General Electric Company, Defendants-Appellees.

No. 95-50091.

United States Court of Appeals,
Fifth Circuit.

April 29, 1996.

Plaintiffs brought action against manufacturers of military aircraft, following fatal crash of aircraft, on claims of negligence and products liability. The United States District Court for the Western District of Texas, Morey L. Sear, Chief Judge, granted summary judgment for defendants. The Court of Appeals, Goodwin, Circuit Judge, sitting by designation, held that: (1) manufacturers had government contractor immunity from claims for strict liability, negligence, breach of warranty, and gross negligence in design, manufacture, and marketing of aircraft; (2) under Georgia law, manufacturers did not have duty to warn military of any danger in design of electrical circuits on aircraft; and (3) plaintiffs were not entitled to depose more than 16 witnesses on issue of liability.

Affirmed.

Appeal from the United States District Court for the Western District of Texas.

Before POLITZ, Chief Judge, and GOODWIN[1] and DUHÉ, Circuit Judges.

GOODWIN, Circuit Judge:

Plaintiffs, bringing product liability claims arising out of a fatal crash of an Air Force C-5A in Germany, appeal the summary judgment in favor of defendants, Lockheed and General Electric. We affirm.

I. BACKGROUND

The crash occurred approximately 17 seconds after takeoff from Ramstein Air Base in Germany on August 29, 1990. Thirteen of the seventeen servicemen aboard the aircraft were killed. Plaintiffs sued on theories of manufacturer's liability based upon Georgia state law failure to warn, breach of warranty and gross negligence.

A. *The Crash Aircraft*

The C-5A was designed, manufactured and delivered to the Air Force pursuant to a government contract with Lockheed Corporation.[2] Although the original procurement contract may have contained only general specifications, the actual development of the C-5A resulted in detailed specifications designed by both the defendants and the Air Force. Lockheed subcontracted with General

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[1] Circuit Judge of the Ninth Circuit, sitting by designation.

[2] Lockheed is a Delaware corporation and maintains its principal place of business in Georgia.

Electric to design and manufacture engines for the C-5A.[3] General Electric manufactured and designed the thrust reversers in Ohio. Lockheed installed the General Electric engines into the C-5A and conducted the remainder of its work on the C-5A in Georgia. The first C-5A was delivered to the Air Force, in Georgia, in 1971. The crash aircraft was maintained at Kelly Air Force Base in San Antonio, Texas, but flew missions all over the world.

B. *Modification of the Crash Aircraft*

From time to time, the C-5A, including the crash aircraft, has undergone modifications based on recommendations from the Air Force and from Lockheed itself. The modification relevant to this case was made pursuant to Engineering Change Proposal ("ECP") 7054. As requested and agreed to by the Air Force, the purpose of ECP 7054 was to reconfigure the engine pylons to maximize the separation of flammable substances from ignition sources. This reconfiguration also involved the relocation of the ground stud whose failure allegedly caused the accident. Importantly, however, the relocation of the ground stud did not change the original design of the circuit. Lockheed designed and manufactured a kit, based on ECP 7054, that was used to retrofit the pylons on all C-5As. The Air Force was to begin taking delivery of these kits in 1981. The Air Force, and not Lockheed or General Electric, installed the kits on the aircraft.

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[3] General Electric is incorporated and maintains its principal place of business in New York.

C. *Air Force Involvement in the Design and Manufacture of the C-5A*

The Air Force was at all relevant times, and still is, closely involved in the design, manufacture and maintenance of the C-5A. The Air Force directly participated in the design of nearly every part of the aircraft. In the instances where the Air Force was not directly involved, it approved the designs after reviewing them in detail with the relevant personnel of the defendants. As the planes were being manufactured and developed, the Air Force required Lockheed to put the various components through rigorous testing to ensure that all of the contract specifications had been satisfied. The Air Force reviewed and approved these tests. The Air Force did not merely "rubber stamp" the tests and data, but placed its officers on site to observe the development and manufacture of the C-5A, including the electrical circuit design at issue in this case. Once the planes were built, the Air Force and Lockheed conducted joint tests before putting them into active military service.

II. PROCEDURAL BACKGROUND

Seven separate lawsuits were filed in Texas and Florida state courts. Representatives of eleven of the decedents and one of the survivors filed products liability lawsuits asserting claims based on strict liability, negligence, negligent failure to warn, breach of warranty, and

gross negligence in the design, manufacture and marketing of the C-5A aircraft.[4]

The plaintiffs theorized that the aircraft crashed because of an uncommanded and undetected deployment of the thrust reverser on one of the two engines on the left side of the aircraft. The plaintiffs alleged that this deployment was caused by the defective design and manufacture, or modification, of the electrical system contained in the pylon (the component that attaches the engine to the wing). Although the plaintiffs' brief characterizes this as "one of the theories of liability" it is the only one mentioned in the record.

The electrical system was configured so that the circuit that sends the signals to deploy or retract the thrust reverser, the "enunciator", and the circuit that sends signals back to the cockpit control panel, the "indicator", were grounded by physical attachment to the same ground stud. The plaintiffs believe, but offered no proof, that this ground stud failed, causing a single point electrical failure, and simultaneously disabled both the enunciator and indicator circuits, making it impossible for the crew to know that the thrust reverser was deployed.

The defendants, on the other hand, contended that the accident was caused by crew inattention.

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[4] Most of the plaintiffs are citizens of Texas, although others are citizens of Florida, Kansas, Missouri and North Dakota.

The defendants removed all of the lawsuits to federal district courts in Texas and Florida on the basis of diversity jurisdiction. The Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407, transferred the cases to the Western District of Texas for pretrial proceedings because most of the plaintiffs are Texas residents and many relevant documents and witness [sic] were located at Kelly Air Force Base.

The district court, applying Texas conflicts-of-law rules borrowed from the Restatement (Second) of the Conflicts of Law, held that Georgia substantive law, instead of Texas law, governed the dispute. The court granted summary judgment in favor of the defendants on all of the plaintiffs' claims based on the original design of the electrical system in the pylons, and the pylon kit modifications, because they were time barred by Georgia's statute of repose.[5] (Memorandum and Order of July 14, 1994 and Memorandum and Order of January 6, 1995, respectively). The court also applied the statute of repose to the plaintiffs' failure to warn claim because there was no evidence that the defendants had *actual* knowledge of

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[5] Ga.Code Ann. § 51-1-11 (Michie 1993). The Georgia statute of repose extinguishes certain products liability claims if they are not brought within 10 years of the first sale of the allegedly defective product. Modifications that change the original design can restart the tolling of the statute of repose, but the modifications in this case did not change the original design of the circuit and therefore the statute of repose did not restart. *See Butchkosky v. Enstrom Helicopter Corp.*, 855 F.Supp. 1251, 1257 (S.D.Fla.1993) (modification must change original design of critical component that is alleged to have caused the injury).

any danger that the system may have harbored.[6] The court rejected the plaintiffs' breach of warranty claims because no privity of contract existed between the parties as required under Georgia law. Finally, the court rejected the claim based upon allegations of willful, wanton and reckless misconduct (gross negligence) because the plaintiffs offered no evidence to support recovery under this theory. The court did not rule on the defendants' government contractor immunity defense because at the time it was presented the plaintiffs had not sufficiently articulated what they thought was the cause of the accident. Therefore, the court could not make the necessary factual findings to determine whether government contractor immunity applied. *See* Memorandum and Order of November 14, 1994 at 13. The court considered the defenses based upon the statute of repose, and the lack of any duty to warn the Air Force of obvious design characteristics in which the Air Force had participated as sufficient grounds to grant summary judgment.

Plaintiffs' timely appeals were consolidated by this Court *sua sponte*.

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[6] The district court misinterpreted Georgia law on failure to warn claims. *See Chrysler Corp. v. Batten*, 264 Ga. 723, 450 S.E.2d 208, 211-13 (1994) ("the legislature carefully excluded failure to warn causes of action from the statute of repose" where the manufacturer has *actual or constructive* knowledge of a danger) (emphasis added). That error does not affect the outcome of this case.

III. GOVERNMENT CONTRACTOR IMMUNITY

A. *Standard of Review*

We review the grant of summary judgment *de novo*. *FDIC v. Ernst & Young*, 967 F.2d 166, 169 (5th Cir.1992). Once a motion for summary judgment has been properly made, the burden shifts to the nonmovant to go beyond the pleadings and by his or her own affidavits, depositions, answers to interrogatories, or admissions to come forward with specific facts showing that there is a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); Fed.R.Civ.Proc. 56(e).

Although, as noted, the district court did not specifically rule on government contractor immunity, that defense is properly briefed in both the trial court and this court. All the depositions and affidavits relevant to the defense were before the court at the time of its final ruling. We hold that the contractor immunity defense was itself a sufficient basis for summary judgment with respect to all claims, except possibly the "failure to warn" claim. We are obliged, moreover, to affirm a correct decision for any appropriate reason supported by the record. *Pitts v. American Sec. Life Ins. Co.*, 931 F.2d 351, 357 (5th Cir.1991).

B. *The Boyle Test for Government Contractor Immunity*

In *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988) the Supreme Court wrote that

> [l]iability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. *Id* at 512, [108 S.Ct. at 2518].

The Court explained that government contractor immunity is derived from the Government's immunity from suit where the performance of a discretionary function is at issue. *Id* at 511, 108 S.Ct. at 2518 (citing the Federal Tort Claims Act, 28 U.S.C. § 2680(a)).[7] The Court concluded that "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function." *Id* at 511, 108 S.Ct. at 2518.

The first two elements of the test ensure that the Government, and not the contractor, is exercising discretion in selecting the design. The third element is necessary to eliminate any incentive that this defense may create for contractors to withhold knowledge of risks. *Boyle*, 487 U.S. at 512, 108 S.Ct. at 2518.

1. The Air Force Approved Reasonably Precise Specifications

In *Stout v. Borg-Warner Corp.*, 933 F.2d 331 (5th Cir.1991), this Court enumerated some of the constituents

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[7] Section 2680(a) creates an exception to the consent to suit otherwise established by the Federal Tort Claims Act, 28 U.S.C. § 1346(b).

of "reasonably precise specifications" and government approval of those specifications for the purposes of satisfying the first element of the government contractor immunity defense. We held that the government contractor immunity defense is available where "review [of the project] involved, inter alia, [the contractor's] submission of detailed drawings at various progressive stages of the design, critical design reviews where Army engineers' critiqued [the contractor's] work, and, finally, the production of prototype models tested and evaluated for months by the Army for its actual performance." *Stout*, 933 F.2d at 336. *See Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (1989) (if government engages in meaningful review of design the first element of Boyle test is established); *see also Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698, 701 (4th Cir.1989) ("It is this salient fact of governmental participation in the various stages of the aircraft's development that establishes the military contractor defense."); *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1320 (11th Cir.1989) (requirement that government approve reasonably precise specifications is met where contractor incorporated design that government subsequently reviewed and approved).

In this case, the Air Force's substantive review, evaluation and testing of the C-5A clearly implicates the Government's discretionary function and approval of reasonably precise specifications. The defendants included with their motion for summary judgment unrebutted affidavits declaring that Lockheed, General Electric and the Air Force worked closely together on the development of the C-5A from its planning stages to its full production. In addition, the Air Force, through its personnel,

inspected and supervised every aspect of the production of the C-5A. Clearly, the approvals in this case go far beyond mere rubber stamping. *See Trevino*, 865 F.2d at 1480 ("When the government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion"). In this case, the Government did not leave "the critical design decisions to the private contractor," but worked closely with the defendants every step of the way. *Trevino*, 865 F.2d at 1480.

2. The C-5A Conformed to the Reasonably Precise Specifications

The plaintiffs argued that the C-5A did not conform to the original design specifications because "[w]hat the Air Force chose in the C-5A procurement program was a failsafe performance specification. . . . " According to the plaintiffs, the design of the circuit was not failsafe because a single point electrical failure, such as the one alleged to have occurred, could result in an accident. However, such a general design specification is not contemplated by the first element of the *Boyle* test because "[o]nly the detailed, quantitative specifications – and not those calling for such vagaries as a failsafe, simple or inexpensive product – are relevant to the government contractor defense." *Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698, 703 (4th Cir.1989).

The defendants introduced evidence showing that the Air Force inspectors were present and actively involved throughout the design, review, development and testing of the C-5A. Furthermore, the evidenced [sic]

showed that the Air Force accepted and has used the C-5A for over 20 years without any significant problems. From this evidence the district court could have concluded that the C-5A was built in accordance with Air Force specifications. *See Smith v. Xerox Corp.*, 866 F.2d 135, 138 (5th Cir.1989).

In an attempt to rebut the defendants' evidence, the plaintiffs included affidavits and other exhibits describing the general process of military procurement for military aircraft, such as the C-5A, where the Government has very little to do with the actual design and development of the plane. However, none of that information specifically addresses the actual development of the C-5A; the information describes only how procurement was to work in theory. This background information, while interesting, is of no legal relevance because it does not rebut the defendants' highly specific information about the actual development of the C-5A.

3. Warning of Dangers not Known to the Air Force

Finally, the plaintiffs argue that the defendants did not warn the Air Force about the dangers created by the design of the electrical circuit. The defendants had a duty to warn the Air Force only of design defects of which the Air Force had no knowledge. *See Stout*, 933 F.2d at 336.

The unrebutted deposition testimony of an Air Force engineer involved in the development and implementation of ECP 7054 described how wires were moved from one place in the pylon to another, but that if two wires terminated into the same ground stud that was not

changed. This testimony places beyond all the doubt the Air Force's specific knowledge about the design of the electrical circuit. This conclusion about the Air Force's knowledge is sound, even without the benefit of the deposition testimony, because in order for the Air Force to have changed the location of the ground stud in the pylon pursuant to the modification, its responsible officers had to have seen the stud and been aware of its design.

The unrebutted affidavits and exhibits describing the development of the C-5A clearly establish that the Air Force approved reasonably precise specifications of the C-5A, the C-5A conformed to those specifications and the Air Force was aware of any safety implications created by the design of the electrical circuit. The plaintiffs did not come forward, as is their burden on summary judgment, with any evidence to create a triable issue of material fact. Therefore, the defendants are entitled to the government contractor immunity defense.

IV. FAILURE TO WARN

A separate failure to warn claim may survive the government contractor immunity defense if the defendant cannot establish "an identifiable federal interest or policy in the existence or methods of warning and a significant conflict between the federal interest or policy and the operation of state law." *Garner v. Santoro*, 865 F.2d 629, 635-36 (5th Cir.1989). A conflict between federal policy and state law might arise if there is evidence that the Government was involved in the decision to give, or not to give, a warning. *Id. But see Stout*, 933 F.2d at 336-37

(applying government contractor immunity to a failure to warn claim without reference to a "significant conflict"); *Smith*, 866 F.2d at 139 (same), *Trevino*, 865 F.2d at 1487 (same). However, if the failure to warn claim is part of the design defect or unreasonably dangerous product theory of liability, then government contractor immunity applies.[8] *Garner*, 865 F.2d at 632 n. 8, 635. We will not address whether, under the facts of this case, the failure to warn claim would be defeated by government contractor immunity because the record does not establish whether or not the Air Force and Lockheed or General Electric were involved in discussions about warnings. Without such evidence in the record, it is not possible for this Court to determine whether the Government exercised sufficient discretion with respect to a warning to bring the warning claim within the scope of *Boyle*. Therefore, we will address the failure to warn claim only on the point whether the manufacturer had a duty, under the relevant state law, to give warnings of facts that were equally within the knowledge of the Air Force.

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[8] It is interesting to note that plaintiffs, in their summary judgment reply brief, argued that their failure to warn claim is "nothing more nor less than a type of a design defect." (Record at 1803). If the trial court accepted this argument, then the plaintiffs' failure to warn claim would also have failed because of government contractor immunity. On appeal, however, plaintiffs have asserted that a failure to warn claim is distinct from a design defect claim, and is not preempted by government contractor immunity.

A. *Choice of Law*

1. Determining Which Choice of Law Rules to Apply

We review a district court's choice of law determination *de novo*. *Allison v. ITE Imperial Corp.*, 928 F.2d 137, 138 (5th Cir.1991). In a diversity action, a federal court must apply the choice of law rules of the state in which it sits. *Klaxon Co. v. Stentor Elec. Manufacturing Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941). Where a transferee court presides over several diversity actions consolidated under the multidistrict rules, the choice of law rules of each jurisdiction in which the transferred actions were originally filed must be applied. *Van Dusen v. Barrack*, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964); 28 U.S.C. § 1407. Both Texas and Florida have adopted the same choice of law rules: the Most Significant Relationship test set forth in Sections 6 and 145 of the Restatement (Second) of Conflict of Laws (the "Restatement").[9] *See Gutierrez v. Collins*, 583 S.W.2d 312,

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[9] Restatement Section 6 states:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

318 (Tex.1979); *Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999 (Fla.1980). Under this doctrine, a court, subject to constitutional constraints, must apply the law of the state with the most significant relationship to the particular substantive issues before the court. Because both parties agree that either Texas or Georgia law applies, this Court's inquiry is limited to the substantive law of those two states. *See Mitchell v. Lone Star Ammunition, Inc.*, 913

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement Section 145 states:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil [sic], residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

F.2d 242, 249 (5th Cir.1990); *Crisman v. Cooper Industries*, 748 S.W.2d 273, 276 (Tex.App.-Dallas 1988).

All of the causes of action in this case rely on the same theory of liability: the defective manufacture and design of the electrical system in the pylon. Therefore, the district court correctly determined that the only substantive issue for the purpose of conflicts analysis was the alleged design defect. *See e.g., Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex.1984).

2. The Most Significant Relationship Analysis

Restatement Section 6 contains the general principles involved in the conflicts analysis whereas Restatement Section 145 lists the factual matters to be considered when applying the Section 6 principles to a given case. *See Crisman v. Cooper Industries*, 748 S.W.2d 273, 276 (Tex.App.-Dallas 1988). The application of the most significant relationship test turns on the qualitative nature of the contacts rather than the quantity of the contacts outlined in the Restatement. *Id.* Because the place of injury is fortuitous, correct analysis should give more weight to each state's contacts with the design and manufacture of the electrical system than to the residential choices of the plaintiffs. *See Foster v. United States*, 768 F.2d 1278, 1282-83 (11th Cir.1985) (fortuitous nature of aircraft accident locale entitled place of injury factor to little weight in conflicts analysis); Restatement § 145, comment e.

Virtually all of the relevant conduct complained of took place in Georgia, with some possible activity by General Electric in Ohio. Georgia thus has the strongest

interest in applying its law to businesses that design, manufacture and sell products into its stream of commerce. Texas on the other hand, has its only relevant contacts with this case in the fact that many, but not all, of the plaintiffs are domiciled there. Because both the case law and the Restatement instruct us to place more emphasis on the place of the alleged misconduct, than on the residential preferences of scattered plaintiffs, the district court correctly concluded that Georgia law should apply.

B. *The Defendants Had No Duty to Warn*

In order to defeat the summary judgment, the plaintiffs must offer evidence tending to prove that the defendants knew about a danger created by the design of the wiring and that the failure to warn of that danger was the proximate cause of the injuries alleged. *See Talley v. City Tank Corp.*, 158 Ga.App. 130, 279 S.E.2d 264 (1981). However, there is no duty to warn a purchaser of a physical fact that is open and obvious, or of any potential risk which is equally known and appreciated by both the manufacturer and the purchaser. *Herschel McDaniel Funeral Home, Inc. v. Hines*, 124 Ga.App. 47, 183 S.E.2d 7, 9 (1971); *YMCA v. Bailey*, 112 Ga.App. 684, 146 S.E.2d 324 (1965); *Gibson v. Consolidated Credit Corp.*, 110 Ga.App. 170, 138 S.E.2d 77 (1964).

As discussed with respect to the government contractor immunity defense, the Air Force was so involved in the C-5A project it knew about the danger – if any – inherent in the circuit design. Therefore, the defendants

did not have a duty to warn the Air Force. We affirm the summary judgment against the plaintiffs on this claim.

V. LIMITATIONS ON DISCOVERY

A. *Standard of Review*

We review decisions regarding discovery for abuse of discretion. *Duke v. University of Texas*, 729 F.2d 994, 997 (5th Cir.), *cert. denied*, 469 U.S. 982, 105 S.Ct. 386, 83 L.Ed.2d 320 (1984).

B. *Number of Witnesses Permitted for Depositions*

The plaintiffs argue that this Court should reverse because the district court abused its discretion by limiting the number of witnesses they could depose on the liability issue to 16 for each side. The plaintiffs also want the opportunity to depose more witnesses on issues related to the claims that were not based on the original design of the C-5A. Limiting the number of deposition witnesses to sixteen for each side is not an abuse of discretion in this case. The plaintiffs actually deposed only 15 of their allotted 16 witnesses. Furthermore, we find nothing in the record to suggest that plaintiffs made a timely request to go back and look into issues that were unexamined in earlier discovery, or that plaintiffs were prejudiced by the limitation. The decision to limit deposition testimony to 16 witnesses for each side does not require reversal of this summary judgment.

VI. CONCLUSION

In sum, the defendants have come forward with sufficient evidence to support the assertion of the government contractor immunity defense, and the plaintiffs have failed to raise any genuine issue of material fact regarding that defense. In addition, the defendants did not have the duty to warn the Air Force of the danger – if any – created by the design of the electrical circuit because the Air Force knew as much as the defendants knew about the design of the circuit. Finally, the district court did not abuse its discretion by limiting each side to 16 depositions. The summary judgment for the defendants Lockheed and General Electric is affirmed.

AFFIRMED.

APPENDIX 2

Olga PEREZ, etc., et al. and David Edward Perez, et al., Plaintiffs-Appellants,

v.

LOCKHEED CORP. and General Electric Company, Defendants-Appellees.

No. 95-50091.

United States Court of Appeals,
Fifth Circuit.

July 5, 1996.

Plaintiffs brought action against manufacturers of military aircraft, following fatal crash of aircraft, on claims of negligence and products liability. The United States District Court for the Western District of Texas, Morey L. Sear, Chief Judge, granted summary judgment for defendants. The Court of Appeals, Goodwin, Circuit Judge, sitting by designation, 81 F.3d 570, affirmed. On plaintiff's petition for rehearing, the Court of Appeals denied petition but clarified prior opinion by holding that under Georgia law, manufacturers did not have duty to warn military or pilots of any danger in design of electrical circuits on aircraft.

Petition denied.

Appeal from the United States District Court for the Western District of Texas.

Opinion filed April 29, 1996,
81 F.3d 570 (1996).

Before POLITZ, Chief Judge, and GOODWIN[1] and DUHÈ, Circuit Judges.

PER CURIAM:

We clarify our panel opinion in this case by amending Section IV.B as follows:

B. *The Defendants Had No Duty to Warn*

In order to defeat the summary judgment, the plaintiffs must offer evidence tending to prove that the defendants knew about a danger created by the design of the wiring and that the failure to warn of that danger was the proximate cause of the injuries alleged. *See Talley v. City Tank Corp.*, 158 Ga.App. 130, 279 S.E.2d 264 (1981). However, there is no duty to warn a purchaser of a physical fact that is open and obvious, or of any potential risk which is equally known and appreciated by both the manufacturer and the purchaser. *Herschell McDaniel Funeral Home, Inc. v. Hines*, 124 Ga.App. 47, 183 S.E.2d 7, 9 (1971); *YMCA v. Bailey*, 112 Ga.App. 684, 146 S.E.2d 324 (1965); *Gibson v. Consolidated Credit Corp.*, 110 Ga.App. 170, 138 S.E.2d 77 (1964). The duty to warn extends to the ultimate user of a product. *See, e.g., White v. W.G.M. Safety Corp.*, 707 F.Supp. 544, 547 (S.D.Ga.1988), aff'd 891 F.2d 906 (11th Cir.1989).

We need not determine whether, under Georgia law, the Air Force or the pilots are the ultimate users of the C-5A. As discussed, with respect to the government contractor immunity defense, the Air Force was so involved

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[1] Circuit Judge for the Ninth Circuit, sitting by designation.

in the C-5A project it knew about the danger – if any – inherent in the circuit design. Therefore, the defendants did not have a duty to warn the Air Force. In addition, the defendants had no duty to give a warning to the pilots because the Air Force was a learned intermediary. *See, e.g., Stuckey v. Northern Propane Gas Co.*, 874 F.2d 1563, 1568-69 (11th Cir.1989) (manufacturer's duty to warn ultimate consumer is discharged where an intermediary party has knowledge of the danger). We affirm the summary judgment against the plaintiffs on this claim.

With this amendment, IT IS ORDERED that the petition for rehearing is DENIED. No active judge of the court or member of the panel has requested an en banc poll, the suggestion for rehearing en banc is also DENIED.

APPENDIX 3

MINUTE ENTRY
SEAR, J.
NOVEMBER 23, 1993

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE AIR DISASTER AT RAMSTEIN AIR BASE, GERMANY, ON 8/29/90	* * * * * *	CIVIL ACTION MDL. NO. 919 ALL CASES SECTION "G"

MEMORANDUM AND ORDER

(Filed Nov. 26, 1993)

This action arises from the August 29, 1990 crash of an United States Air Force C-5A Galaxy aircraft at Ramstein Air Base, Germany. Of the seventeen military personnel on board the aircraft when it crashed, thirteen were fatally injured. Defendants Lockheed Corporation ("Lockheed") and General Electric Company ("G.E.") removed seven separate state causes of action filed against them to federal court under the Courts' diversity jurisdiction.[1] Six cases were removed to the Southern District of Florida and one to the Western District of Texas. Upon motion by Lockheed, the Judicial Panel on Multidistrict Litigation issued a Transfer Order pursuant

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[1] 28 U.S.C. § 1332

to 28 U.S.C. § 1407 centralizing pretrial proceedings in all cases in the Western District of Texas.[2]

Lockheed filed and G.E. joined in this motion to apply Georgia law to the issues of liability involved in this case. Plaintiffs oppose the motion, claiming that Texas law should apply to all liability issues.

Analysis

I. Conflict of Laws Principles

A transferee court presiding over diversity actions consolidated under the multidistrict rules must apply the choice of law rules of the various jurisdictions in which the transferred actions were originally filed. *See Klaxon Co. v. Stentor Electric Manufacturing Co.*, 61 S.Ct. 1020, 1021-22 (1944); *In re Air Crash Disaster near Chicago*, 644 F.2d 594, 610 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981). Accordingly, the choice of law rules of Texas and Florida must be applied.

Both Texas and Florida have adopted the same choice of law rule; the Most Significant Relationship approach

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[2] *See* Order of June 4, 1992.

delineated in sections 6[3] and 145[4] of the Restatement (Second) of Conflict of Laws. *See Gutierrez v. Collins*, 583

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[3] § 6 Choice-of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include,

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and applicability of the law to be applied.

Restatement (Second) of Conflict of Laws § 6 (1971).

[4] § 145 The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

S.W.2d 312, 318 (Tex. 1979); *Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999 (Fla. 1980). Under this approach the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984).

II. Identification of Interested States

The first step in the analysis of choice of law is to identify the relevant state contacts as set out in § 145.[5] Plaintiffs' action challenges the design and manufacture of a Lockheed aircraft. Because the aircraft and pylon component kits were designed, manufactured and entered into the stream of commerce in Georgia,[6] the conduct causing the injury occurred in Georgia.

(c) the domicile, residence, nationality, place of incorporation and place of business or the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) of Conflict of Laws § 145 (1971).

[5] The parties contend and I agree that factors (2)(a) & (d) are inapplicable to this case.

[6] *See* Lockheed's Supporting Brief, Affidavit of Carl Weaver, at 1-2. A product enters the stream of commerce when "it is released in some manner to the consuming public." *Armstrong Rubber Company v. Urguidez*, 570 S.W.2d 374, 376 (Tex. 1978). The allegedly defective aircraft was delivered to the Air Force on January 9, 1971 in Marietta, Georgia. *See* Lockheed's Supporting Brief, Affidavit of Carl Weaver, at 2. Accordingly, the aircraft entered into the stream of commerce in Georgia.

The parties to this action are located throughout the United States. Defendant Lockheed is a Delaware corporation and maintains its principal place of business in Georgia.[7] Defendant G.E. is incorporated and maintains its principal place of business in New York.[8] The plaintiffs and intervenor are citizens of Texas, Florida, Kansas, Missouri and North Dakota.[9]

Despite the number of states having a relationship to the parties and accident, only Texas and Georgia are considered since no party contends that the law of any other state should be applied. *See Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 249 (5th Cir. 1990); *Crisman v. Cooper Industries*, 748 S.W.2d 273, 276 (Tex. App-Dallas 1988).

The second step of the analysis requires an examination of the relevant liability laws of Georgia and Texas to determine whether they conflict with each other. Where the laws do not conflict, the law of the forum generally applies. *See In re Air Crash Disaster at Washington, D.C.*, 559 F.Supp. 333, 342 n.10 (D.D.C. 1983). If the laws do

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Plaintiffs claim, however, that the pylon component kits entered into the stream of commerce in Texas. Plaintiffs' Response Memorandum, at 3. There is no evidence to support this allegation. Furthermore, defendants proffer evidence that the kits were delivered to the Air Force in Marietta, Georgia. *See* Lockheed's Reply Brief, Affidavit of Chuck Thompson. Accordingly, the pylon component kits also entered into the stream of commerce in Georgia.

[7] *See* Notices of Removal filed by defendants.

[8] *Id.*

[9] It is alleged that twenty of twenty-five plaintiffs reside in Texas. *See* Plaintiffs' Memorandum in Opposition, at 3.

conflict, the most significant relationship test is applied. *See In re Air Crash Disaster near Chicago*, 644 F.2d at 605; *In re Disaster at Detroit Metro. Airport*, 750 F.Supp. 793, 796 (E.D.Mich. 1989).

III. Evaluation of the Relevant Laws

Though other conflicts exist, the most apparent and significant conflict between the products liability laws of Georgia and Texas is Georgia's statute of repose, which bars all products liability claims if not brought within ten years from the first sale of the product. *See* Ga. Code Ann. § 51-1-11 (b)(2), (c) (Michie 1993).[10] Texas law does not bar products liability actions in a similar fashion.[11] Accordingly, the most significant relationship analysis must continue.

IV. Evaluation of Competing Interests

Texas and Georgia both have numerous contacts to this action. The application of the most significant relationship test, however, turns on "the qualitative nature of [the] contacts as affected by the policy factors enumerated in § 6." *Id.* Furthermore, the relevant policies of the competing forums are "the most popular and often the

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[10] Texas construes a statute of repose as a matter of substantive law and, therefore, such a statute must be considered in a choice of law analysis. *See Crisman*, 748 S.W.2d at 276.

[11] Florida's statute of repose was repealed by its legislature in 1986.

most important" of the § 6 criteria. *Moorhead v. Mitsubishi Aircraft Intern.*, 639 F.Supp. 385, 390-91 (E.D.Tex. 1986).

Texas' only contact with this action is the citizenship of some of the plaintiffs. Texas has an interest in protecting its citizens from defective or dangerous products. Accordingly, because some of the plaintiffs are citizens of Texas, it has an interest in the resolution of this action. *See Mitchell*, 913 F.2d at 249. Texas' interest in protecting its citizens, however, is no greater than that of any other state whose citizens are plaintiffs.[12]

Conversely, when the place of injury is largely fortuitous,[13] the Restatement provides that the law of the place of the misconduct should be given greater weight. *Digioia v. H. Koch & Sons*, 944 F.2d 809, 813-14 (11th Cir. 1991) (citing *Pittway v. Lockheed Corp.*, 641 F.2d 524, 528 (7th Cir. 1981)); Restatement (Second) of Conflict of Laws § 145(2) comment e. Furthermore, as the situs of defendant's manufacturing facilities, Georgia is closely linked to plaintiffs' cause of action, which challenges the design and manufacture of a Lockheed aircraft. *Adams v. Gates Learjet Corp.*, 711 F.Supp 1374, 1375 (N.D.Tex. 1988). Georgia's interest in determining the liability and controlling the

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[12] Plaintiffs contend that because so many of those affected by this accident live or lived in Texas, that state has the most significant interest in applying its law to the liability issue. This contention, however, is misguided. It is well established that to simply apply the law of the state with the greatest number of actual contacts is improper. *Mitchell*, 913 F.2d at 249.

[13] *See Foster v. United States*, 768 F.2d 1278, 1282-83 (11th Cir. 1985) (fortuitous nature of aircraft accident entitled first factor to little weight); *In re Air Crash Disaster at Sioux City*, 781 F.Supp. 1307, 1310 (N.D.Ill. 1991) (same).

conduct of Lockheed is even more pronounced because the allegedly defective products were manufactured, designed, and entered into the stream of commerce there. *See Mitchell*, 913 F.2d at 250.

Products liability laws such as Texas' render a manufacturer potentially liable for his product any time after its initial sale. Through the enactment of the statue [sic] of repose, Georgia has made a policy decision to limit the liability of manufacturers by alleviating the heavy burden imposed by this "perpetual" liability. *See Weeks v. Remington Arms Co.*, 733 F.2d 1485, 1487 (11th Cir. 1984); *Lamb v. Volkswagenwerk A.G.*, 631 F.Supp. 1144, 1147 (S.D.Fla. 1986). That decision is intended to attract industry to Georgia.[14] Accordingly, Georgia's interest in having its laws applied is more significant.

Furthermore, a defendant may justifiably expect to defend itself in the state in which it designed, manufactured, and placed a product into the stream of commerce. *See Crisman*, 748 S.W.2d at 280. Conversely, a plaintiff cannot justifiably expect to pursue a lawsuit in his home state when both the injury and defective product arose elsewhere. This is especially true when plaintiffs from other states are similarly injured.

To hold that a manufacturer must defend itself against the laws of a state simply because an injured plaintiff is a citizen of that state circumscribes the

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[14] The statute of repose was enacted long after Lockheed commenced its operations in Georgia. Its enactment may, however, serve as a strong inducement for Lockheed to remain in Georgia.

Restatement's objective of certainty, predictability, and uniformity of result. *See* Restatement (Second) of Conflict of Laws § 6(f). In the present case, plaintiffs are citizens of five different states. Therefore, even though plaintiffs contend that only one of these five states has a significant interest, it is impossible to ascertain which of the five, if any, has a greater interest in protecting its citizens. To base a choice of law decision solely on the citizenship of the plaintiffs would potentially subject manufacturers to the laws of all fifty states. In this case, only through application of the laws of the state in which the defective product was designed, manufactured, and released into the stream of commerce will the Restatement's objective be achieved.

Finally, plaintiffs claim that if Georgia law is applied to the liability issues, the harsh result will be that no plaintiff will recover under Georgia's products liability provisions. However, no matter how harsh the final result may be, it is not the function of the Court to question the wisdom of the Georgia legislature.[15]

Georgia's policy interest in protecting those that design, manufacture and release products into the stream of commerce in Georgia bears the most significant relationship to the facts underlying plaintiffs' cause of action. Accordingly,

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[15] Texas courts have not hesitated to apply foreign law to a products liability case, even when that application leads to the invocation of a statute of repose. *See Crisman*, 748 S.W.2d 273.

IT IS ORDERED that defendants' motion for the application of Georgia law to the issue of liability is GRANTED.

/s/ Morey L. Sear
MOREY L. SEAR
UNITED STATES
DISTRICT JUDGE

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE: AIR DISASTER AT RAMSTEIN AIR BASE, GERMANY, ON AUGUST 29, 1990	))))	MDL DOCKET NO. 5-92-MD-919 ALL CASES

ORAL DEPOSITION OF RICHARD E. YOUNG

OCTOBER 12, 1993

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* * *

[p. 32] mainly because I don't think I could understand it well enough to ask you.

A. Yeah. But –

Q. So you and I are just going to be talking about your memorandum that you wrote.

A. Yeah.

Q. Okay.

A. And that's basically – I think we've pretty well covered everything that I can offer in terms of this particular document.

Q. Well, let me see if I've got some more questions with it and we'll see – we're not quite through the paragraph and perhaps we can ask. Did you talk to Mr. Gulik about this?

A. Yes.

Q. And "about this," I mean about paragraph 3?

A. Yeah. I showed him the wiring diagram and he offered his comments and we discussed it to some degree.

Q. Did he tell you that G.E. had already designed it, that there shouldn't be two wires on one grounding connection?

A. No, I don't think he said that.

Q. Well, did he say that you designed it to have separate grounds?

[p. 33] A. He said it was designed with separate grounding pins for each of the circuits.

Q. Now, would the separate grounding pins or studs – strike that. Did you discuss with him the preclusion of a single point failure mechanism as a result of using two wires to one grounding pin?

A. I'm sorry. I didn't quite understand what you were –

Q. All right. Well, in the last sentence in that paragraph the statement if made by you, "Splitting the common ground" – that means not having more than one wire to one pin; is that what that means?

A. That's what I would interpret that, yes.

Q. – "would preclude a single point failure mechanism."

A. That's right.

Q. And did Mr. Gulik tell you that?

A. If the stud broke off – off of the pylon, or wherever it's connected, and the two wires were together, obviously, then you would lose both grounding – or both circuits.

Q. And if you had – and that would be a single point failure?

A. Yeah. If they had two wires connected to [p. 34] the same ground and the ground broke off of the bulkhead or the fixture and there was no affective [sic] ground, yes, you would.

Q. Well, you would have the potential for a single point failure by just putting the two wires on the pin, would you not, sir?

A. If the pin breaks off, yes.

Q. If you put the two wires on the pin, you have created a potential for a single point failure, have you not, sir?

MR. SPRAGUE: Object to leading the witness.

THE WITNESS: I have already stated that I am not an aircraft electrical engineer. I have no recollection – or no background that I can consider myself to be an expert in critiquing whether or not you run two wires to the same pin or not. I can tell you from my experience, yes, I know that if you lose that pin and it falls off and you had two wires coming to it, yes, you lose your ground.

Now, the advisability of that or not, I just don't feel that I'm in a position to be an expert witness to comment

on that. I am not familiar with aircraft wiring, and design practices, and military specifications, and those things. So I

* * *

[p. 40] marked for identification)

Q. (BY MR. PARKS:) Was G.E. required to design the electrical system of the thrust reverser system so that it would not have a single point failure mechanism in it?

A. It stated – we met the design requirements as specified in that particular document.

Q. Would that be one of those – is it your understanding that you do not have a single point failure mechanism?

A. That would be my understanding of what the words say.

Q. And was your understanding based upon what Mr. Gulik told you at the time you wrote this –

A. Yeah.

Q. – letter that originally G.E. had complied with that requirement; is that correct?

A. We complied with the requirements of that specification. That's correct.

Q. I'm only interested, sir, as to single point failure mechanisms. You complied with that – that was a prohibition by the specifications, was it not?

A. Yes.

Q. And you complied with that is what [p. 41] Mr. Gulik told you?

A. Yes.

Q. And was it your understanding then that Lockheed had changed that without you [sic] knowledge; is that correct?

MR. SPRAGUE: I object to that leading question.

THE WITNESS: I've answered that question three times now.

MR. PARKS: Well, I don't think so.

MR. O'NEILL: I'll let you go ahead and answer it. I think he's answered it twice, not three times. The last one would have answered three times.

THE WITNESS: I had no prior knowledge that there was a – that the two circuits in the wiring harness that is the General Electric design end of the thrust reverser. We have the thrust reverser wiring harness and we provide connectors, and from there on out, it's airframe wiring; and we provided for single ground capability. Not single point, but each circuit had it's separate ground pin. That's the way we designed it. That design, therefore, met the requirement of that specification. I have no comment about what took – I have no knowledge of how Lockheed and their

* * *

[p. 60] had two pins, but in fact had one pin; is that right?

MR. PARKS: Yes.

MR. O'NEILL: Okay.

Q. (BY MR. PARKS:) I want you to assume that General Electric had designed – pursuant to 41060 had designed a system, this system we've been talking about, which provided for two wires to one ground for the thrust reverser indication lights. Would that be a violation of the safety provisions of this particular contract?

A. In my opinion, if we run two circuits into one ground pin, it would have been a violation of the requirements of this document.

Q. Thank you, Mr. O'Neill Did you –

MR. O'NEILL: Excuse me one minute. Let's have that question read back.

(The requested material was read back)

MR. O'NEILL: Hold on just a second. Yes. The indication system was on the same ground. I think you need to rephrase your question. I think you misstated it.

MR. PARKS: I'm talking about the indication system and the actuator system, the

* * *

[p. 68] specification that you have in front of you.

THE WITNESS: Which specific paragraph of the specification are you –

Q. (BY MR. PARKS:) Paragraph A, sir, on page 35.

A. Whether a single ground point contact would fall into that category? I think that I'd have to take considerable more time to study it. And, as I've stated, I really

have no expert opinion to say that a single point with two separate wires going into it does or does not constitute a single point failure.

Q. Well, if G.E. had not split the common ground, as referred to in your letter of February 20, 1992, would that have been a violation of the contract?

A. If we provided and hooked up both of them into one pin, in my opinion we would not have met the specification as it's written in the spec.

MR. O'NEILL: Now, note that he's saying it would not have met this specification and you keep asking about the contract, which is the problem.

MR. PARKS: Okay. All right.

Q. (BY MR. PARKS:) So we're talking about the specification which is contained in Deposition

* * *

[p. 171] it there?

A. Yes.

Q. – that you had written to the Air Force and your statement in there concerning G.E.'s position about the fact that a single ground had been provided in the design as you –

A. Separate.

Q. Excuse me. – a separate ground had been provided in the design which you believe met G.E.'s compliance requirements with the specifications.

A. Yes.

Q. And you recall also you told me earlier that you did not realize that there was a double ground being utilized on this aircraft until Dover, when you and Mr. Gulik were there with Mr. –

A. No. I'll clarify that. I was under the impression that there were separate grounding circuits on the thrust reverser circuitry.

Q. And you learned that they had been using a double wire on one single ground when you got to Dover is what you told me?

A. Two wires coming into one point.

Q. Yes.

A. Yes. That's what was told to me, yes.

Q. At Dover?

[p. 172] A. At Dover.

Q. At any time between the time of the original design of the thrust reversers and the information that you got at Dover concerning that, do you know whether the Air Force approved the double wire to the single ground?

A. No. I would have no way to know that.

Q. Do you know whether anyone at Lockheed advised the Air Force of the double wire to the single ground?

A. No. I would have no way to know that, no.

Q. Do you know of anyone at Lockheed who advised, orally or in writing, anyone at General Electric

of the fact that they were going to use a double wire to the single ground?

A. No. I don't have knowledge of any of that ever taking place.

Q. Did you ever have any discussion with Mr. Gulik at General Electric concerning that whole subject matter, the double wire to the single ground?

A. Yes. Because it was brought up as part of the safety investigation at Dover.

Q. Before that?

A. Before that? No. Didn't know about it before that.

[p. 173] Q. Was it your impression, and I realize that it's only an impression unless he indicated to you outright, that Mr. Gulik did not know that there was a double ground – a double wire to the single ground being used until Dover?

A. That's correct.

Q. Was he surprised?

A. I believe that that was the first that he was aware that there was a single ground being brought off –

Q. With the double wire?

A. – with – you know, to a wire coming off of each of our connectors and then connected to a single point. Yes. That was – as far as I know, that was his first knowledge of that.

Q. Did he express any feelings or impressions or opinions about that to Mr. – to anyone at Lockheed when he found that out at Dover?

A. He didn't find it out. Mr. Mills brought it up.

Q. Okay. When he learned about it from Mr. –

A. When he learned about it from Mr. Mills.

Q. What did he say to Mr. Mills, do you know?

A. He didn't offer any real comments, to my knowledge and recollection. You know, that's just –

* * *

APPENDIX 5

DEPOSITION EXHIBIT 1

[Letterhead Illegible]

February 20, 1992

SUBJECT: C5 TF39 THRUST REVERSER ELECTRICAL SYSTEM MODIFICATION

REFERENCE: SAALC Proposed Thrust Reverser Electrical System Modification Program

Mr. Charles Jurek
Deputy Division Chief
LAD
Kelly Air Force Base, Texas

On November 21, 1991 GEAE received a wiring diagram and an outline of a SAALC program plan to modify the C5/TF39 Thrust Reverser Electrical System. At SAALC's request, GEAE Thrust Reverser Design and Systems Engineering has completed a review of the referenced Modification Program. As you are undoubtedly aware, the proposed modifications address aspects of the Thrust Reverser System that were not originally designed by General Electric. However, in light of our long mutually satisfactory business relationship, GEAE is happy to provide the following comments.

The proposed modifications will increase their complexity of the overall system and introduce additional electrical connections as well as a more complex arrangement of switches. It is GEAE's opinion that the additional connectors and switches could have a significantly detrimental impact on overall system reliability.

GEAE recommends that SAALC provides a separate ground for the Thrust Reverser System indication lights, *i.e.*, split the common ground. In fact, GEAE designed the system with separate grounds: thus provisions for separate grounds are already available in the existing Thrust Reverser wiring harness. Splitting the common ground would preclude a single point failure mechanism and provide the desired redundant warning system.

GEAE Thrust Reverser Design and Systems Engineering personnel are available to discuss our recommendations at you [sic] convenience, if desired. If you have any questions, please advise.

/s/ R. E. Young

R. E. Young, Manager
TF39 Programs
L/B 94

Phone 513 552-3133
Fax 513-552-3299

(2)

Supreme Court, U.S.
FILED
NOV 7 1996
CLERK

No. 96-550

In The

Supreme Court of the United States

October Term, 1996

SIGRID CHASE, DEBORAH CLEYMAN, JUDY GORDON, SULEMA R. VILLARREAL, ELVIRA HERRERA, SUSAN JEAN PRICE, SYLVIA GARZA, individually and in their representative capacities; BARBARA KNUTSON, DAVID EDWARD PEREZ, JOSEPH MANUAL PEREZ, JOHN PAUL PEREZ, DANIEL RICHARD PEREZ, individually; and ESTHER PEREZ, as next friend and guardian of JAMES PEREZ, a minor,

Petitioners,

vs.

LOCKHEED CORPORATION and GENERAL ELECTRIC CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE FIFTH CIRCUIT CORRECTLY APPLIED THE GOVERNMENT CONTRACTOR DEFENSE FORMULATED IN *BOYLE V. UNITED TECHNOLOGIES*.

II. WHETHER THE "MOST SUBSTANTIAL RELATIONSHIP" CHOICE OF LAW TEST USED BY TEXAS AND FLORIDA ENSURES DUE PROCESS OF LAW SUCH THAT APPLICATION OF GEORGIA SUBSTANTIVE LAW ON LIABILITY ISSUES IN THIS CASE WAS CONSTITUTIONALLY PERMISSIBLE.

LIST OF INTERESTED PARTIES

Petitioners' List of Interested Parties is accurate except that Glynda Knutson was not a party to the proceedings in the Fifth Circuit, having previously dismissed her claims with prejudice. Petitioners' List is also incomplete having omitted the parent corporation of Lockheed Corporation, i.e., Lockheed Martin Corporation, which was included in the Certificate of Interested Parties in Appellees' Brief in the Fifth Circuit.

Respondents are correctly identified in the caption. Ron A. Sprague of Gendry & Sprague, P.C. is liaison counsel of record for both Respondents. Ron A. Sprague is also counsel for Respondent Lockheed Corporation. Jack O'Neill of Clements, O'Neill, Pierce & Nickens, L.L.P. is counsel for Respondent General Electric Company.

In accordance with Rule 29.6, Lockheed Corporation certifies that Lockheed Martin Corporation is its parent corporation and Martin Marietta Corporation is an affiliate corporation. General Electric Company certifies that it has three non-wholly owned subsidiaries, each of which has publicly held equity securities, *viz.*, CAMCO, Inc. (Canada), General Electric Capital Corporation f/k/a General Electric Credit Corporation, and Montgomery Ward & Co., Incorporated.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Fifth Circuit. The Court of Appeals' opinion is reported at 81 F.3d 570 and is reproduced in the Appendix filed herewith ("App.") at App. 1-20. The Court of Appeals' amended opinion denying Appellants' Petition for Rehearing is reported at 88 F.3d 340 and reproduced at App. 21-23.

STATEMENT OF THE CASE

I.

COURSE OF PROCEEDINGS BELOW

This action arises from the August 29, 1990 crash of a U. S. Air Force C-5A Galaxy transport plane shortly after takeoff from Ramstein Air Base, Germany. Of the seventeen persons on board, thirteen received fatal injuries. One case involving representatives of the estates of six of the decedents and one surviving crewman was filed in State District Court in Bexar County, Texas. (R. 2620).[1] Six separate cases were filed on behalf of the representatives of the estates of six other decedents in State Court in Dade County, Florida.[2] Heirs of the remaining decedent,

[1] *References to the Record will be made using the abbreviation "R" and the sequential page number.*

[2] *Gordon* (R. 2880), *Herrera* (R. 3023), *Price* (R. 3149), *Villarreal* (R. 3281), *Garza* (R. 3411), and *Cleyman* (R. 3552). The allegations in all of these complaints are essentially identical.

SSgt. Rande J. Hulec, intervened in this case in February of 1994, but withdrew their intervention the following month. (R. 1287). The other three survivors never filed suit. (R. 2090). All of the state court actions were removed to Federal District Court and, by Order of June 4, 1992, transferred and consolidated by the Judicial Panel on Multidistrict Litigation for pre-trial proceedings in the Western District of Texas. (R. 0001). By subsequent Order dated January 21, 1994, the district court granted the parties' joint Motion to Transfer the trial on liability issues to the Western District of Texas. (R. 1734).

Upon Defendants' Motion, the district court determined that Georgia law properly governs the resolution of the liability issues in this case by Order dated November 23, 1993. (R. 1418). Defendants' Motion for Summary Judgment was then filed based on Georgia substantive law and the Government Contractor Defense. (R. 1271). On July 11, 1994, the district court granted, in part, Defendants' Motion for Summary Judgment, basing its ruling on Georgia law, including the ten-year Georgia statute of repose. (R. 2286). That July 11, 1994 Order dismissed all of Plaintiffs' claims except for "claims arising out of a modification and/or repair to the aircraft at issue subsequent to its delivery to the USAF" and within the ten-year repose period.

After providing all parties ample opportunity to brief their respective positions, the district court ultimately granted Defendants' Motion for Reconsideration and dismissed Plaintiffs' remaining claims when Plaintiffs failed to prove "any connection between the accident and a negligent modification or a design change made to the craft within the ten-year [repose] period." Order of

December 29, 1994. (R. 2602). Final judgment was entered on January 6, 1995. (R. 2860).

Plaintiffs appealed all aspects of the judgment entered below, as well as the district court's case management orders and choice of law rulings to the United States Court of Appeals for the Fifth Circuit.

On appeal, the Fifth Circuit affirmed on all counts. The court specifically held that (1) the application of Georgia law, including Georgia's statute of repose, was correct and appropriate under the applicable choice of law tests (App. 17-18) and (2) that the Government Contractor Defense was itself a sufficient basis for summary judgment with respect to all claims "except possibly the 'failure to warn claim.'" (App. 8). It further held that all "failure to warn claims" were defeated by applicable state law on the facts of this case. (App. 19, 22-23).

II.

STATEMENT OF FACTS

This accident involved an Air Force C-5A Galaxy aircraft, operating in support of the military buildup in Saudi Arabia codenamed "Operation Desert Shield." It was departing Ramstein Air Base, Germany en route to Rhein-Main Air Base, Germany, for maintenance. Shortly after takeoff in the early morning hours of August 29, 1990, the plane started a shallow left turn, contacted trees near the end of the runway and crashed. The plane carried a crew of ten men and seven passengers, all on active duty in the U.S. Air Force.

The cause of the accident is disputed. The only theory pled by Plaintiffs in the district court, and the only one brought forward to the Fifth Circuit, is an alleged uncommanded, unintentional deployment of a thrust reverser on one of the two engines on the left side of the aircraft. On the C-5A Galaxy aircraft, thrust reversers are used to change the direction of the thrust of the aircraft's engines and are used most often when landing the aircraft. Plaintiffs theorize that one of the thrust reversers failed in such a manner and at such a time as to allow the reverser to open shortly after takeoff without the crew being able to detect and correct the problem. They further contend that the open thrust reverser made the aircraft uncontrollable and resulted in the crash.

A brief explanation of the pertinent parts of the thrust reverser electrical system is warranted here. There are two electric circuits on each thrust reverser on the C-5A Galaxy aircraft. One circuit, the "enunciator circuit", sends electrical signals necessary to deploy or retract the thrust reversers. The second electrical circuit, the "indicator circuit", is used to illuminate indicator lights in the cockpit to provide the crew with visual signals concerning the status of the thrust reverser. Both of these circuits, like all electric circuits, have ground wires. On the C-5A Galaxy, the ground wires for both the enunciator circuit and the indicator circuit for each individual thrust reverser are bundled into a wiring harness that terminates at the male end of a "cannon plug." When the engines and thrust reversers are mounted onto the aircraft, the thrust reverser electrical system is connected to the aircraft's electrical system by "plugging it in" at a suitable connector on the pylon. Within the pylon, wires

providing the necessary continuity from the cannon plug are grounded by physical attachment to a single ground stud on a ground bus bar mounted on the airframe itself. Plaintiffs' theory of causation contends that one of these single ground studs "failed," thus simultaneously disabling both the enunciator and indicator circuits for the affected thrust reverser.[3]

In contrast, LOCKHEED brought forth evidence that the accident was most likely caused by crew inattention. (R. 0980). The flight had been delayed for over eight hours because of various maintenance problems. The departure time had slipped to just after midnight. The crew had been on the aircraft for many hours. The mission had been changed from a flight "down range" to Saudi Arabia to a simple ferry flight to another air base a short distance away. There were no lights on the departure horizon and the crew had no visual references to fly by after takeoff. The pilot was preoccupied with power adjustments during the takeoff roll and initial climb. The aircraft entered a slight left bank almost immediately upon liftoff and no corrective action was taken by the

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[3] Petitioners' complaints and discovery responses all initially alleged that the ground stud on the Number 1 Engine Pylon failed and caused the accident. However, LOCKHEED's investigation successfully retrieved the section of pylon containing this ground stud from among the aircraft wreckage in Germany and brought it back to the United States for testing. That testing showed that the ground stud functioned as designed, even after the crash. (R. 173). Petitioners then changed their theory to allege a failure of the Number 2 Engine ground stud which was never recovered from the wreckage.

crew. In fact, there was no indication that the crew recognized that the aircraft was not climbing properly or that it had begun the banking left turn until just before it struck a stand of pine trees near the departure end of the runway. The plane was airborne for about seventeen seconds before it crashed. Computer simulations confirmed that an inadvertent input of approximately seven degrees of turn on the control yoke, if left uncorrected, would result in the banking left turn experienced by this plane on its last flight.

The C-5A Galaxy transport plane was designed and manufactured by Lockheed Aeronautical Systems Company, a division of LOCKHEED. It is one of the world's largest aircraft. Physically, the C-5A is 247.8 feet long and has a wing span of 222.8 feet. It is powered by four TF39-GE-1C turbo fan engines, manufactured by GENERAL ELECTRIC and rated at 43,000 pounds of thrust each. Its cargo hold is 19 feet wide, 13.5 feet high, and 144.6 feet long. Without refueling, the C-5A can airlift 76.5 tons of men, women and supplies for 5,000 nautical miles. With its air refueling capability, it has worldwide range. It is indeed a technological marvel. (Affidavit of O. V. Braun, hereinafter "Braun"; R. 1287-1302; App. 24-37).[4]

The C-5A Galaxy was designed and manufactured under a contract with the United States Air Force. The contract required LOCKHEED, as prime contractor, to work closely with, and under the surveyance of, Air Force engineers and systems management specialists in

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[4] Mr. Braun was LOCKHEED's Manager of Military Contracts.

the course of developing the aircraft. All subcontractors to LOCKHEED worked under the same governmental supervision. *The C-5A, and its* component parts, were built in accordance with detailed specifications approved by the U. S. Air Force. (Braun; R. 1292-1301).

The procurement process for the C-5A was initiated by the United States Air Force on October 14, 1964, when it issued a Request for Proposal for the Long Range Heavy Logistical Transport System 410A. (Braun; R. 1290). After more than three years of development and testing, all under government supervision, the first C-5A was "rolled out" on March 2, 1968, at the LOCKHEED plant at Marietta, Georgia. (Affidavit of Carl Weaver, hereinafter "Weaver"; R. 1304; App. 38-40).[5] The first flight took place later that year. Testing of the aircraft continued in accordance with the contract. The C-5A Galaxy involved in this case was delivered on January 9, 1971. (Braun; R. 1296).

All C-5As, including the accident aircraft, were sold by LOCKHEED to the United States Air Force and delivered in Marietta, Georgia. LOCKHEED currently employs approximately 12,000 people at their Marietta, Georgia plant and has been in continual operation there, in one form or another, since 1951. It still manufactures and designs aircraft there, primarily for the United States' military forces. (Weaver; R. 1303; App. 38-39).

From time to time, LOCKHEED has made recommendations to and received recommendations from the Air

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[5] Mr. Weaver was LOCKHEED's C-5 Engineering Program Manager when his Affidavit was prepared in this case, March 10, 1993.

Force relating to design changes on the C-5A aircraft and/or its components. When LOCKHEED made recommendations concerning design changes, it was required to submit an Engineering Change Proposal (ECP) to the Air Force. The Air Force accepted some ECP's and disapproved others. No change to the design of the aircraft or its components could be made by LOCKHEED without United States Air Force approval. (Braun; R. 1299-1300; Depo of Henry Fraser, hereinafter "Fraser", Second Supplemental Record, p. 11).[6]

Of particular relevance to this case is one such Engineering Change Proposal, ECP 7054. Plaintiffs' sole theory of causation in this case involves a grounding stud that was relocated during a modification of the aircraft performed pursuant to ECP 7054. As was noted both by the district court and Fifth Circuit, the relocation of the ground stud did not modify the original configuration of the circuit. The same wires were terminated to the same ground stud both before and after the ECP 7054 modification. However, and more importantly, the modifications made pursuant to ECP 7054 were reviewed in great detail by U.S. Air Force engineers and approved by them prior to installation on any C-5A aircraft, including the one in question. Air Force engineers had full knowledge of the system, including the fact that both wires for the thrust reverser system terminated at a single ground stud. (Fraser; S.S.R. 66-67).

The history of ECP 7054 begins in 1978 when Air Force engineers sought to improve the maintainability of

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[6] Further references to the Second Supplemental Record will be made with the abbreviation "S.S.R."

the pylons on the C-5A fleet. (Fraser; S.S.R. 19-23). They turned to LOCKHEED and asked it to make a proposal concerning configuration changes in the hydraulic, electrical and fuel systems in the pylons to maximize the separation of flammable substances from ignition sources. That request was made by Mr. Henry Fraser, Chief of C-5 Engineering and Reliability Branch of the Air Force's San Antonio Air Logistics Center. His office was responsible for evaluating and approving all such design changes on the C-5A aircraft. LOCKHEED made several proposals and, through a detailed process of interaction with the Air Force engineers, developed and submitted ECP 7054. The Air Force studied LOCKHEED's proposal and conducted a "kit proofing" on a prototype kit. During that "kit proofing," Air Force technicians installed the proposed kit on a C-5A Galaxy to test each component for fit and function. LOCKHEED provided engineering support to the Air Force during the "kit proofing," but the review was conducted by Mr. Fraser's department and under his supervision. (Fraser; S.S.R. 55).

As a result of the "kit proofing" and their study of the proposed design changes, the Air Force approved ECP 7054, contracted with LOCKHEED to manufacture the kits, and ordered that all C-5A Galaxies be retrofitted. That work was done by Air Force technicians or contractors other than LOCKHEED and GE.[7] All of the pylons on the accident aircraft had been so modified.

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[7] In fact, GENERAL ELECTRIC did not participate at all in ECP 7054.

All of the ECP 7054 kits were manufactured by LOCKHEED in its Marietta, Georgia plant. They were all inspected by Air Force Plant Representatives, accepted and delivered to the Air Force in Marietta, Georgia. From there, the Air Force shipped them to wherever they were to be utilized.

C-5A Galaxy aircraft are operated by the United States Air Force, Air Force Reserves, and Air National Guard. In fact, these are the only entities ever to have operated the C-5A Galaxy. Accordingly, the Air Force is the most knowledgeable organization regarding the aircraft's operations. Moreover, the Air Force and its Reserve components are solely responsible for the maintenance of the C-5A fleet. The Air Force was made aware of any risks inherent in the aircraft that were known to LOCKHEED or GENERAL ELECTRIC during design of the C-5A Galaxy and its thrust reverser systems. In fact, LOCKHEED and GENERAL ELECTRIC went to great lengths to identify and evaluate potential hazards. Documents of the extensive tests and analyses conducted were submitted in the form of engineering reports to the Air Force. After 20 years of service experience, neither LOCKHEED nor GENERAL ELECTRIC is aware of a danger in the design of the aircraft which was not known by the Air Force at the time it approved the design or which did not become known to the Air Force during its operation of the aircraft prior to the accident. (Braun; R. 1300). With regard to the kits installed pursuant to ECP 7054, the Air Force had complete knowledge of every component involved, including specifically the fact that the two electrical ground wires for each thrust reverser systems were terminated to a single ground stud. Any

"constructive knowledge" of a risk involved with that design was also known to the Air Force prior to the accident of August 29, 1990.

III.

CORRECTION OF MISSTATEMENTS IN THE PETITION

Petitioners have made numerous misstatements in the petition involving facts, evidence and the decisions of the lower courts. Although it is not practical to correct every misstatement, pursuant to United States Supreme Court Rule 15.2, Respondents bring the following misstatements to the Court's attention.

Petitioners misrepresent the nature of the mission on which the accident aircraft was embarked by claiming it was being used in support of the Persian Gulf War's Operation Desert Storm. The accident actually occurred during the military buildup preceding the outbreak of hostilities in the Persian Gulf. Therefore, the mission was part of Operation Desert Shield. (Petition, p. 3)

Petitioners also misrepresent the evidence they presented on the issue of causation. (Petition, p. 4) No witness ever testified, by affidavit, deposition or otherwise, that a single point electrical failure on takeoff led to an inadvertent deployment of a thrust reverser. The only evidence submitted by Petitioners on the issue of causation was several theories of Mr. Oddvar Olav Bendiksen, a doctor of philosophy and aeronautical engineer, that listed seven "probable primary failure modes." (*See*, R. 2453-2454). One of those hypothetical failure modes was described by Mr. Bendiksen as "the single point ground

fault at the pylon busbar." Mr. Bendiksen defined "probable primary failure mode" in his deposition as something "that you cannot rule out because you have absolute evidence to the contrary . . . It doesn't mean it's a likely thing, but it's something that could happen." (Bendiksen depo., p. 122). Even more telling is the fact that Mr. Bendiksen later testified by affidavit that, in his opinion, "the most probable failure mode involved a sudden *powered extension* of the No. 2 thrust reverser shortly after liftoff." His final conclusion, therefore, precluded the possibility of a ground fault, (*See*, R. 2586) contradicted his prior testimony, and, most importantly, is completely contrary to the "facts" represented to this Court in the Petition for Certiorari.

Petitioners also misrepresent that the "single ground" design of the thrust reverser electrical system in the C-5A pylons did not comply with the government approved design specifications, (Petition, p. 7-8) that LOCKHEED altered GENERAL ELECTRIC's design, (Petition, p. 4-5) and that the Air Force first learned of the design after the accident in question. (Petition, p. 5) In actuality, the fact that the wiring design complied with specifications provided or approved by the Air Force was unrebutted. Even the testimony of the GENERAL ELECTRIC witnesses presented by Petitioners in the Appendix to their Petition, at page App. 35-43, shows that those witnesses were talking about a different part of the aircraft's electrical system. GENERAL ELECTRIC did, in fact, design the wiring on the thrust reverser components such that separate ground wires for the enunciators and the indicator lights existed. Those wires were bundled into a wiring harness and terminated on separate pins in

the wiring harness connector. GENERAL ELECTRIC's design was in full compliance with government approved design specifications and was never changed. LOCKHEED mated the connector from the thrust reverser wiring harness with the aircraft's electrical system, including its various grounding bus bars, through a plug on the forward bulkhead of the pylon, when the engines and thrust reversers were mounted on the aircraft. No GENERAL ELECTRIC employee or Air Force representative ever testified that he was critical of the design of the pylon wiring for the thrust reverser circuits and GENERAL ELECTRIC's witnesses never testified that LOCKHEED's design for the ground bus bar violated Air Force specifications, as claimed by Petitioners. Petitioners are, in fact, confusing the design of the thrust reverser component wiring, which by its physical configuration required two wires, with the pylon electrical system, which properly grounded both circuits to a single ground stud.

In Petitioners' Appendix, at App. 36, Mr. Young explained to Petitioner's counsel that he was not qualified nor in a position to give an opinion on whether or not the wiring design in question created a potential for a "single point failure" as follows:

> "I have already stated that I am not an electrical engineer. I have . . . no background that I can consider myself to be an expert in critiquing whether or not you run two wires to the same pin or not . . . I just don't feel that I'm in a position to be an expert witness to comment on that. I am not familiar with aircraft wiring,

> and design practices, and military specifications, and those things . . . "

He added at Petitioners' App. 39-40:

> "As I've stated, I really have no expert opinion to say that a single point with two separate wires going into it does or does not constitute a single point failure."

Indeed, the Air Force did not "split the common ground" in the pylon wiring system even after their system review following this accident. Similarly, the evidence was unrebutted that the Air Force knew of the single ground stud design in the pylon all along, especially following the ECP 7054 modification. (Fraser, S.S.R. 43-44)

Petitioners mischaracterize the nature of Specification 41060 and its relevance to the Government Contractor Defense. They describe that specification as "detailed and quantitative", when it actually was neither. Instead, it set forth general design criteria that the Air Force wanted the C-5A to meet. Regardless of how Specification 41060 is characterized, however, the relevant evidence on the Government Contractor Defense is that the Air Force knew the *exact* details of how the C-5A wiring system was actually designed and manufactured. The evidence was unrebutted that the Air Force approved the design originally and again when the ECP 7054 modifications were reviewed. Nothing in the Fifth Circuit's opinion was unusual or unique regarding what constitutes Government approval under *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988). There is no justification here for granting certiorari, given the undeniable fact that the Air Force approved the design of the wiring as installed on the aircraft whether

or not Petitioners think that design might have been inconsistent with Specification 41060.

Petitioners further misstate the facts relating to the choice of law determination. (Petition, p. 6) Some of the plaintiffs below and some of the decedents were Texas domiciliaries, some were not. While LOCKHEED and GENERAL ELECTRIC have done business in Texas, only a small part of that business relates to the C-5A Galaxy and none of the design, manufacturing or delivery activities for the aircraft in question or the ECP 7054 kits occurred in Texas. Specifically, the ECP 7054 kits were not delivered to the Air Force in Texas as stated by Petitioners. The Air Force accepted delivery of those kits in Georgia. (R. 1421)

Petitioners grossly mischaracterize the Fifth Circuit's holding regarding the Government's approval of reasonably precise design specifications for the C-5A Galaxy. Petitioners claim the Fifth Circuit's opinion

> "appears to immunize a contractor from liability under state law upon mere proof that the United States had significant involvement with the development of a particular product in general, or that a governmental employee came to know of a product's physical configuration."

Petition, p. 11.

In fact, the Fifth Circuit was very clear on this issue. Its actual holding in that regard was set forth as follows:

> "The Air Force was at all relevant times, and still is, closely involved in the design, manufacture and maintenance of the C-5A. *The Air Force directly participated in the design of nearly every part of the aircraft.* In the instances where the Air

> Force was not directly involved, it approved designs after reviewing them in detail . . . "

(App. 4, emphasis added).

As for Petitioners' reference to "a governmental employee" who "came to know of a product's physical configuration," this Court should note that the employee who came to know of the design configuration for the ground studs incorporated into ECP 7054 was Mr. Henry Fraser, the Air Force's Chief of C-5A Engineering and Reliability.

It should also be noted by this Court, as it was by the Fifth Circuit, (*See*, App. 12-13), that the "highly specific" evidence proving that "Air Force inspectors were present and actively involved throughout the design, review, development and testing of the C-5A" was unrebutted. (App. 12-13).

Finally, Petitioners misrepresent what they call a "perverse twist of irony" by claiming that Georgia would not have applied its own law had these cases been filed in Georgia instead of Texas and Florida. Respondents concede that Georgia's choice of law rule is *"lex loci delecti,"* and that Georgia would normally apply the law of the place of the plane crash, even where the primary negligent conduct took place in Georgia. *Risdon Enterprises, Inc. v. Colemill Enterprises, Inc.*, 324 S.E.2d 738 (Ga. App. 1984). However, it is far from clear whether Georgia courts would have applied German law in this case pursuant to that rule or opted to use its public policy exception as set forth in *Baltimore Football Club, Inc. v. Lockheed*, 525 F. Supp. 1206 (N.D. Ga. 1981). There the Court noted:

> While Georgia courts do not follow the 'most significant relationship test' . . . there is some

> room for policy considerations in a conflict of laws decision. Georgia courts will not enforce foreign statutory law in a tort action where the foreign law is contrary to Georgia public policy.

Id. at 1209. [citations omitted]; *See,* also *Alexander v. General Motors Corp.,* 466 S.E.2d 607 (Ga. App. 1995).

Georgia's public policy in the area of products liability is embodied in its statute O.C.G.A. § 51-1-11. Those policies differ greatly from the laws of the Republic of Germany, where this accident occurred. *See, Melton v. Borg-Warner Corp.,* 467 F. Supp. 983, 985 (W.D. Tex. 1979) (no theory of strict liability under German law). Would a Georgia court considering this case have applied German substantive law to hold a Georgia manufacturer liable to out-of-state Plaintiffs suing under the Texas Wrongful Death Act? The answer is certainly not as clear as Plaintiffs would have one believe. The one thing that is clear is that Georgia certainly would not have applied Texas law.

Perhaps the real "perverse twist of irony" is that Petitioners could have argued for German law to apply in lieu of Georgia law had they filed this case in Georgia. While Respondents doubt it would have made any difference, Petitioners essentially waived that option by filing in Texas and Florida where the "most substantial relationship" test applied and mandated use of Georgia law. It really makes no difference what a Georgia court might have done with this case, Petitioners opted not to travel that road.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT BETWEEN THE FIFTH CIRCUIT'S DECISION AND THIS COURT'S FORMULATION OF THE *BOYLE* GOVERNMENT CONTRACTOR DEFENSE

Petitioners argue essentially that the Fifth Circuit Court of Appeals misapplied a properly stated rule of law. *See*, Supreme Court Rule 10, last sentence. To the contrary, however, the opinion below faithfully applied the elements of the Government Contractor Defense as set forth in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988). It found, based on uncontroverted evidence, that the Air Force inspected and supervised every aspect of the production of the C-5A. (App. 10-11). Referring to *Stout v. Borg-Warner Corp.*, 933 F.2d 331 (5th Cir. 1991), *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), *Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698 (4th Cir. 1989), and *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989), the Fifth Circuit held that:

> "In this case, the Air Force's substantive review, evaluation and testing of the C-5A clearly implicates the Government's discretionary function and approval of reasonably precise specifications."

(App. 10).

The Court below also ruled that Defendants' evidence, including highly specific information about the actual development of the C-5A, and testimony showing that the Air Force accepted and used the C-5A for over

twenty years, supported the district court's conclusion that the aircraft was built in accordance with Air Force specifications. (App. 11-12). *See, Smith v. Xerox Corp.*, 866 F.2d 135, 138 (5th Cir. 1989).

The Fifth Circuit again relied on unrebutted affidavits and exhibits presented to the district court in finding that "the Air Force was aware of any safety implications created by the design of the electrical circuit." (App. 13).

Significantly, the Court noted:

> "The plaintiffs did not come forward, as is their burden on summary judgment, with any evidence to create a triable issue of material fact. Therefore, the defendants are entitled to the government contractor immunity defense."

(App. 13).

Petitioners are frankly correct that the defense formulated in *Boyle* does not shield a supplier of military equipment from liability where the Government did not substantively evaluate the design in question. However, that is not this case. Petitioners refuse to accept the fact that, in this case, the Government not only approved reasonably precise design specifications as required by *Boyle*, the Air Force also studied, approved and installed the ECP 7054 kits reincorporating the alleged "defect" into the C-5A pylons. Similarly, while it is true that, under *Boyle*, the product must comply with the approved specifications, in this case the evidence was unrebutted that the C-5A did comply. The evidence below was clear and unambiguous that the specific electrical design on the accident aircraft was the same design approved by

the Air Force, both initially and during the ECP 7054 modification. The Air Force's knowledge was of the system as designed and installed. There was no alteration of either GENERAL ELECTRIC's wiring design for the thrust reverser components or for the design of the pylon wiring circuits which mated to it. The Air Force's chief engineer testified, regarding those components as installed during the ECP 7054 modification, that "his people" (i.e., his engineering staff) and the Air Force technicians who installed the kits knew where each of the wires terminated and where they went. (Fraser, S.S.R. p. 66-67)

II.

ALL OF THE PETITIONERS' CLAIMS WERE DEFEATED BY APPLICABLE STATE LAW; THE PROPER APPLICATION OF THE GOVERNMENT CONTRACTOR DEFENSE WAS MERELY AN ADDITIONAL GROUND FOR UPHOLDING THE DISTRICT COURT'S JUDGMENT

While the Fifth Circuit properly and appropriately applied the Government Contractor Defense in this case, it did so only as a second ground for upholding the district court's judgment. The primary ground was the fact that those claims were all defeated by applicable Georgia state law. The results under Georgia law are not challenged by Petitioners here, nor do they directly challenge the factual determination that Georgia had the "most substantial relationship" to the liability issues in this case. Petitioners' sole complaint to this Court is that they have been denied due process by the use of Georgia's substantive law. That complaint is without merit as discussed below.

The Georgia statute of repose bars all of Petitioners' claims for strict liability and negligence because the C-5A in question was "first sold" over ten years prior to the filing of this suit. (App. 6). All breach of warranty claims are defeated by the lack of privity between the Petitioners and the Respondents. (App. 7). Allegations of willful, wanton and reckless misconduct were dismissed because no evidence to support such theories was presented. (App. 7). The "failure to warn" claims were properly dismissed because the manufacturers had no duty to warn the servicemen and women on the accident aircraft because the Air Force already knew of any risks and was a "learned intermediary" under applicable Georgia law. (App. 22-23).

III.

THE "MOST SUBSTANTIAL RELATIONSHIP" TEST ENSURES DUE PROCESS IN CHOICE OF LAW MATTERS

Application of Georgia law was fair, correct and constitutional such that Petitioners were not denied due process. Petitioners raised the allegation that the application of Georgia law in this case would be unconstitutional for the first time on appeal to the Fifth Circuit. Having failed to raise the point to the district court, Petitioners waived it. *See*, e.g. *Topolian v. Ehrman*, 954 F.2d 1125 (5th Cir. 1992), *cert. denied* 113 S. Ct. 82 (1992). Although mindful that its choice of law determinations were subject to constitutional constraints, the Fifth Circuit did not even bother to discuss Petitioners' cries of "Unconstitutional!" (*See*, App. 16). In fact, the authorities cited to this Court by Petitioners, including this Court's relatively recent

decisions in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed.2d 628 (1985) and *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 101 S. Ct. 633, 66 L. Ed.2d 521 (1981), demonstrate the constitutionality of the "most substantial relationship test" and belie Petitioners' arguments to the contrary.

The holding in *Allstate Ins. Co. v. Hague* and its progeny, including *Phillips*, is simple:

> For a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair.

Allstate Ins. Co., 449 U.S. at 312-13.

Indeed, when one considers the holdings of the Supreme Court in this area, one realizes that the "most significant relationship" test automatically provides the requisite guarantees under due process. The state with the "most significant relationship" to an issue in litigation will always have "a significant contact" creating "state interests" such that application of its law will not be "arbitrary nor fundamentally unfair." The Fifth Circuit obviously understood that relationship.

The "most significant relationship" analysis in this case undoubtably calls for application of Georgia law. The entire C-5A project was centered in Georgia, including the relationships between GENERAL ELECTRIC, LOCKHEED and the Air Force. Both the C-5A Galaxy and the ECP 7054 kits were designed, manufactured and

placed in the stream of commerce in Georgia. The Fifth Circuit summarized the analysis as follows:

> "Virtually all of the relevant conduct complained of took place in Georgia . . . Georgia thus has the strongest interest in applying its law to businesses that design, manufacture and sell products into its stream of commerce . . . Because both the case law and the Restatement instruct us to place more emphasis on the place of the alleged misconduct, than on the residential preferences of scattered plaintiffs, the district court correctly concluded that Georgia law should apply.

App. 17-18.

Since Georgia has the most substantial relationship to the liability issues in this case, and a clearly expressed state interest in regards to that relationship as codified in O.C.G.A. § 51-1-11, especially given the fact that Petitioners voluntarily filed suit in forums relying on the "most substantial relationship" choice of law test, application of Georgia law cannot be said to be arbitrary or fundamentally unfair. It was undoubtably constitutional.

IV.

NO REVIEW OF "LEGISLATIVE JURISDICTION" IS NECESSARY OR APPROPRIATE

Petitioners claim that this case would allow this Court to clarify the relationship between choice of law and "legislative jurisdiction." Again, their claim is misleading and inaccurate. There are no "legislative jurisdiction" issues here. Petitioners cannot be heard to complain about the application of Georgia law or claim that the

choice of law "worked a markedly unfair surprise" upon them as they attempt to do in their Petition. It was not the Georgia legislature that decided what substantive law would be applied in this case. The state courts of Texas and Florida made that decision. The district court and the Fifth Circuit both recognized their obligation to use the state law of the forums (Florida and Texas) in deciding choice of law issues. Petitioners cannot, and do not, contest that Texas and Florida law constitutionally apply to them. Both Texas and Florida use the "most substantial relationship test", which clearly called for the application of Georgia law on issues of liability. Therefore, in the very truest sense, Petitioners selected Georgia substantive law in this case by filing suit in forums that called for its application by their state law choice of law tests.

CONCLUSION

The Petition for Writ of Certiorari should be denied. There is no conflict between the Fifth Circuit's decision below and this Court's formulation of the *Boyle* Government Contractor Defense. Furthermore, the application of Georgia law as mandated by the Texas and Florida "most substantial relationship" test was fair, appropriate, correct and constitutional. Petitioners' continued efforts in

this case to bend the facts and circumvent the law must be stopped now. Their Petition should be denied.

Respectfully submitted,

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APPENDIX 1

In re AIR DISASTER AT RAMSTEIN AIR BASE, GERMANY, on 8/29/90, Plaintiff.

Olga PEREZ, etc., et al., Plaintiffs-Appellants,

v.

LOCKHEED CORP. and General Electric Company, Defendants-Appellees.

No. 95-50091.

United States Court of Appeals,
Fifth Circuit.

April 29, 1996.

Plaintiffs brought action against manufacturers of military aircraft, following fatal crash of aircraft, on claims of negligence and products liability. The United States District Court for the Western District of Texas, Morey L. Sear, Chief Judge, granted summary judgment for defendants. The Court of Appeals, Goodwin, Circuit Judge, sitting by designation, held that: (1) manufacturers had government contractor immunity from claims for strict liability, negligence, breach of warranty, and gross negligence in design, manufacture, and marketing of aircraft; (2) under Georgia law, manufacturers did not have duty to warn military of any danger in design of electrical circuits on aircraft; and (3) plaintiffs were not entitled to depose more than 16 witnesses on issue of liability.

Affirmed.

Appeal from the United States District Court for the Western District of Texas.

Before POLITZ, Chief Judge, and GOODWIN[1] and DUHÉ, Circuit Judges.

GOODWIN, Circuit Judge:

Plaintiffs, bringing product liability claims arising out of a fatal crash of an Air Force C-5A in Germany, appeal the summary judgment in favor of defendants, Lockheed and General Electric. We affirm.

I. BACKGROUND

The crash occurred approximately 17 seconds after takeoff from Ramstein Air Base in Germany on August 29, 1990. Thirteen of the seventeen servicemen aboard the aircraft were killed. Plaintiffs sued on theories of manufacturer's liability based upon Georgia state law failure to warn, breach of warranty and gross negligence.

A. *The Crash Aircraft*

The C-5A was designed, manufactured and delivered to the Air Force pursuant to a government contract with Lockheed Corporation.[2] Although the original procurement contract may have contained only general specifications, the actual development of the C-5A resulted in detailed specifications designed by both the defendants and the Air Force. Lockheed subcontracted with General

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[1] Circuit Judge of the Ninth Circuit, sitting by designation.

[2] Lockheed is a Delaware corporation and maintains its principal place of business in Georgia.

Electric to design and manufacture engines for the C-5A.[3] General Electric manufactured and designed the thrust reversers in Ohio. Lockheed installed the General Electric engines into the C-5A and conducted the remainder of its work on the C-5A in Georgia. The first C-5A was delivered to the Air Force, in Georgia, in 1971. The crash aircraft was maintained at Kelly Air Force Base in San Antonio, Texas, but flew missions all over the world.

B. *Modification of the Crash Aircraft*

From time to time, the C-5A, including the crash aircraft, has undergone modifications based on recommendations from the Air Force and from Lockheed itself. The modification relevant to this case was made pursuant to Engineering Change Proposal ("ECP") 7054. As requested and agreed to by the Air Force, the purpose of ECP 7054 was to reconfigure the engine pylons to maximize the separation of flammable substances from ignition sources. This reconfiguration also involved the relocation of the ground stud whose failure allegedly caused the accident. Importantly, however, the relocation of the ground stud did not change the original design of the circuit. Lockheed designed and manufactured a kit, based on ECP 7054, that was used to retrofit the pylons on all C-5As. The Air Force was to begin taking delivery of these kits in 1981. The Air Force, and not Lockheed or General Electric, installed the kits on the aircraft.

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[3] General Electric is incorporated and maintains its principal place of business in New York.

C. *Air Force Involvement in the Design and Manufacture of the C-5A*

The Air Force was at all relevant times, and still is, closely involved in the design, manufacture and maintenance of the C-5A. The Air Force directly participated in the design of nearly every part of the aircraft. In the instances where the Air Force was not directly involved, it approved the designs after reviewing them in detail with the relevant personnel of the defendants. As the planes were being manufactured and developed, the Air Force required Lockheed to put the various components through rigorous testing to ensure that all of the contract specifications had been satisfied. The Air Force reviewed and approved these tests. The Air Force did not merely "rubber stamp" the tests and data, but placed its officers on site to observe the development and manufacture of the C-5A, including the electrical circuit design at issue in this case. Once the planes were built, the Air Force and Lockheed conducted joint tests before putting them into active military service.

II. PROCEDURAL BACKGROUND

Seven separate lawsuits were filed in Texas and Florida state courts. Representatives of eleven of the decedents and one of the survivors filed products liability lawsuits asserting claims based on strict liability, negligence, negligent failure to warn, breach of warranty, and

gross negligence in the design, manufacture and marketing of the C-5A aircraft.[4]

The plaintiffs theorized that the aircraft crashed because of an uncommanded and undetected deployment of the thrust reverser on one of the two engines on the left side of the aircraft. The plaintiffs alleged that this deployment was caused by the defective design and manufacture, or modification, of the electrical system contained in the pylon (the component that attaches the engine to the wing). Although the plaintiffs' brief characterizes this as "one of the theories of liability" it is the only one mentioned in the record.

The electrical system was configured so that the circuit that sends the signals to deploy or retract the thrust reverser, the "enunciator", and the circuit that sends signals back to the cockpit control panel, the "indicator", were grounded by physical attachment to the same ground stud. The plaintiffs believe, but offered no proof, that this ground stud failed, causing a single point electrical failure, and simultaneously disabled both the enunciator and indicator circuits, making it impossible for the crew to know that the thrust reverser was deployed.

The defendants, on the other hand, contended that the accident was caused by crew inattention.

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[4] Most of the plaintiffs are citizens of Texas, although others are citizens of Florida, Kansas, Missouri and North Dakota.

The defendants removed all of the lawsuits to federal district courts in Texas and Florida on the basis of diversity jurisdiction. The Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407, transferred the cases to the Western District of Texas for pretrial proceedings because most of the plaintiffs are Texas residents and many relevant documents and witness [sic] were located at Kelly Air Force Base.

The district court, applying Texas conflicts-of-law rules borrowed from the Restatement (Second) of the Conflicts of Law, held that Georgia substantive law, instead of Texas law, governed the dispute. The court granted summary judgment in favor of the defendants on all of the plaintiffs' claims based on the original design of the electrical system in the pylons, and the pylon kit modifications, because they were time barred by Georgia's statute of repose.[5] (Memorandum and Order of July 14, 1994 and Memorandum and Order of January 6, 1995, respectively). The court also applied the statute of repose to the plaintiffs' failure to warn claim because there was no evidence that the defendants had *actual* knowledge of

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[5] Ga.Code Ann. § 51-1-11 (Michie 1993). The Georgia statute of repose extinguishes certain products liability claims if they are not brought within 10 years of the first sale of the allegedly defective product. Modifications that change the original design can restart the tolling of the statute of repose, but the modifications in this case did not change the original design of the circuit and therefore the statute of repose did not restart. *See Butchkosky v. Enstrom Helicopter Corp.*, 855 F.Supp. 1251, 1257 (S.D.Fla.1993) (modification must change original design of critical component that is alleged to have caused the injury).

any danger that the system may have harbored.[6] The court rejected the plaintiffs' breach of warranty claims because no privity of contract existed between the parties as required under Georgia law. Finally, the court rejected the claim based upon allegations of willful, wanton and reckless misconduct (gross negligence) because the plaintiffs offered no evidence to support recovery under this theory. The court did not rule on the defendants' government contractor immunity defense because at the time it was presented the plaintiffs had not sufficiently articulated what they thought was the cause of the accident. Therefore, the court could not make the necessary factual findings to determine whether government contractor immunity applied. *See* Memorandum and Order of November 14, 1994 at 13. The court considered the defenses based upon the statute of repose, and the lack of any duty to warn the Air Force of obvious design characteristics in which the Air Force had participated as sufficient grounds to grant summary judgment.

Plaintiffs' timely appeals were consolidated by this Court *sua sponte*.

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[6] The district court misinterpreted Georgia law on failure to warn claims. *See Chrysler Corp. v. Batten*, 264 Ga. 723, 450 S.E.2d 208, 211-13 (1994) ("the legislature carefully excluded failure to warn causes of action from the statute of repose" where the manufacturer has *actual or constructive* knowledge of a danger) (emphasis added). That error does not affect the outcome of this case.

III. GOVERNMENT CONTRACTOR IMMUNITY

A. *Standard of Review*

We review the grant of summary judgment *de novo*. *FDIC v. Ernst & Young*, 967 F.2d 166, 169 (5th Cir.1992). Once a motion for summary judgment has been properly made, the burden shifts to the nonmovant to go beyond the pleadings and by his or her own affidavits, depositions, answers to interrogatories, or admissions to come forward with specific facts showing that there is a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); Fed.R.Civ.Proc. 56(e).

Although, as noted, the district court did not specifically rule on government contractor immunity, that defense is properly briefed in both the trial court and this court. All the depositions and affidavits relevant to the defense were before the court at the time of its final ruling. We hold that the contractor immunity defense was itself a sufficient basis for summary judgment with respect to all claims, except possibly the "failure to warn" claim. We are obliged, moreover, to affirm a correct decision for any appropriate reason supported by the record. *Pitts v. American Sec. Life Ins. Co.*, 931 F.2d 351, 357 (5th Cir.1991).

B. *The Boyle Test for Government Contractor Immunity*

In *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988) the Supreme Court wrote that

> [l]iability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. *Id* at 512, [108 S.Ct. at 2518].

The Court explained that government contractor immunity is derived from the Government's immunity from suit where the performance of a discretionary function is at issue. *Id* at 511, 108 S.Ct. at 2518 (citing the Federal Tort Claims Act, 28 U.S.C. § 2680(a)).[7] The Court concluded that "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function." *Id* at 511, 108 S.Ct. at 2518.

The first two elements of the test ensure that the Government, and not the contractor, is exercising discretion in selecting the design. The third element is necessary to eliminate any incentive that this defense may create for contractors to withhold knowledge of risks. *Boyle*, 487 U.S. at 512, 108 S.Ct. at 2518.

1. The Air Force Approved Reasonably Precise Specifications

In *Stout v. Borg-Warner Corp.*, 933 F.2d 331 (5th Cir.1991), this Court enumerated some of the constituents

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[7] Section 2680(a) creates an exception to the consent to suit otherwise established by the Federal Tort Claims Act, 28 U.S.C. § 1346(b).

of "reasonably precise specifications" and government approval of those specifications for the purposes of satisfying the first element of the government contractor immunity defense. We held that the government contractor immunity defense is available where "review [of the project] involved, inter alia, [the contractor's] submission of detailed drawings at various progressive stages of the design, critical design reviews where Army engineers' critiqued [the contractor's] work, and, finally, the production of prototype models tested and evaluated for months by the Army for its actual performance." *Stout*, 933 F.2d at 336. *See Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (1989) (if government engages in meaningful review of design the first element of Boyle test is established); *see also Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698, 701 (4th Cir.1989) ("It is this salient fact of governmental participation in the various stages of the aircraft's development that establishes the military contractor defense."); *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1320 (11th Cir.1989) (requirement that government approve reasonably precise specifications is met where contractor incorporated design that government subsequently reviewed and approved).

In this case, the Air Force's substantive review, evaluation and testing of the C-5A clearly implicates the Government's discretionary function and approval of reasonably precise specifications. The defendants included with their motion for summary judgment unrebutted affidavits declaring that Lockheed, General Electric and the Air Force worked closely together on the development of the C-5A from its planning stages to its full production. In addition, the Air Force, through its personnel,

inspected and supervised every aspect of the production of the C-5A. Clearly, the approvals in this case go far beyond mere rubber stamping. *See Trevino*, 865 F.2d at 1480 ("When the government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion"). In this case, the Government did not leave "the critical design decisions to the private contractor," but worked closely with the defendants every step of the way. *Trevino*, 865 F.2d at 1480.

2. The C-5A Conformed to the Reasonably Precise Specifications

The plaintiffs argued that the C-5A did not conform to the original design specifications because "[w]hat the Air Force chose in the C-5A procurement program was a failsafe performance specification. . . . " According to the plaintiffs, the design of the circuit was not failsafe because a single point electrical failure, such as the one alleged to have occurred, could result in an accident. However, such a general design specification is not contemplated by the first element of the *Boyle* test because "[o]nly the detailed, quantitative specifications – and not those calling for such vagaries as a failsafe, simple or inexpensive product – are relevant to the government contractor defense." *Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698, 703 (4th Cir.1989).

The defendants introduced evidence showing that the Air Force inspectors were present and actively involved throughout the design, review, development and testing of the C-5A. Furthermore, the evidenced [sic]

showed that the Air Force accepted and has used the C-5A for over 20 years without any significant problems. From this evidence the district court could have concluded that the C-5A was built in accordance with Air Force specifications. *See Smith v. Xerox Corp.*, 866 F.2d 135, 138 (5th Cir.1989).

In an attempt to rebut the defendants' evidence, the plaintiffs included affidavits and other exhibits describing the general process of military procurement for military aircraft, such as the C-5A, where the Government has very little to do with the actual design and development of the plane. However, none of that information specifically addresses the actual development of the C-5A; the information describes only how procurement was to work in theory. This background information, while interesting, is of no legal relevance because it does not rebut the defendants' highly specific information about the actual development of tne C-5A.

3. Warning of Dangers not Known to the Air Force

Finally, the plaintiffs argue that the defendants did not warn the Air Force about the dangers created by the design of the electrical circuit. The defendants had a duty to warn the Air Force only of design defects of which the Air Force had no knowledge. *See Stout*, 933 F.2d at 336.

The unrebutted deposition testimony of an Air Force engineer involved in the development and implementation of ECP 7054 described how wires were moved from one place in the pylon to another, but that if two wires terminated into the same ground stud that was not

changed. This testimony places beyond all the doubt the Air Force's specific knowledge about the design of the electrical circuit. This conclusion about the Air Force's knowledge is sound, even without the benefit of the deposition testimony, because in order for the Air Force to have changed the location of the ground stud in the pylon pursuant to the modification, its responsible officers had to have seen the stud and been aware of its design.

The unrebutted affidavits and exhibits describing the development of the C-5A clearly establish that the Air Force approved reasonably precise specifications of the C-5A, the C-5A conformed to those specifications and the Air Force was aware of any safety implications created by the design of the electrical circuit. The plaintiffs did not come forward, as is their burden on summary judgment, with any evidence to create a triable issue of material fact. Therefore, the defendants are entitled to the government contractor immunity defense.

IV. FAILURE TO WARN

A separate failure to warn claim may survive the government contractor immunity defense if the defendant cannot establish "an identifiable federal interest or policy in the existence or methods of warning and a significant conflict between the federal interest or policy and the operation of state law." *Garner v. Santoro,* 865 F.2d 629, 635-36 (5th Cir.1989). A conflict between federal policy and state law might arise if there is evidence that the Government was involved in the decision to give, or not to give, a warning. *Id. But see Stout,* 933 F.2d at 336-37

(applying government contractor immunity to a failure to warn claim without reference to a "significant conflict"); *Smith*, 866 F.2d at 139 (same), *Trevino*, 865 F.2d at 1487 (same). However, if the failure to warn claim is part of the design defect or unreasonably dangerous product theory of liability, then government contractor immunity applies.[8] *Garner*, 865 F.2d at 632 n. 8, 635. We will not address whether, under the facts of this case, the failure to warn claim would be defeated by government contractor immunity because the record does not establish whether or not the Air Force and Lockheed or General Electric were involved in discussions about warnings. Without such evidence in the record, it is not possible for this Court to determine whether the Government exercised sufficient discretion with respect to a warning to bring the warning claim within the scope of *Boyle*. Therefore, we will address the failure to warn claim only on the point whether the manufacturer had a duty, under the relevant state law, to give warnings of facts that were equally within the knowledge of the Air Force.

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[8] It is interesting to note that plaintiffs, in their summary judgment reply brief, argued that their failure to warn claim is "nothing more nor less than a type of a design defect." (Record at 1803). If the trial court accepted this argument, then the plaintiffs' failure to warn claim would also have failed because of government contractor immunity. On appeal, however, plaintiffs have asserted that a failure to warn claim is distinct from a design defect claim, and is not preempted by government contractor immunity.

A. *Choice of Law*

1. Determining Which Choice of Law Rules to Apply

We review a district court's choice of law determination *de novo*. *Allison v. ITE Imperial Corp.*, 928 F.2d 137, 138 (5th Cir.1991). In a diversity action, a federal court must apply the choice of law rules of the state in which it sits. *Klaxon Co. v. Stentor Elec. Manufacturing Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941). Where a transferee court presides over several diversity actions consolidated under the multidistrict rules, the choice of law rules of each jurisdiction in which the transferred actions were originally filed must be applied. *Van Dusen v. Barrack*, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964); 28 U.S.C. § 1407. Both Texas and Florida have adopted the same choice of law rules: the Most Significant Relationship test set forth in Sections 6 and 145 of the Restatement (Second) of Conflict of Laws (the "Restatement").[9] *See Gutierrez v. Collins*, 583 S.W.2d 312,

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[9] Restatement Section 6 states:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

318 (Tex.1979); *Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999 (Fla.1980). Under this doctrine, a court, subject to constitutional constraints, must apply the law of the state with the most significant relationship to the particular substantive issues before the court. Because both parties agree that either Texas or Georgia law applies, this Court's inquiry is limited to the substantive law of those two states. *See Mitchell v. Lone Star Ammunition, Inc.*, 913

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement Section 145 states:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil [sic], residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

F.2d 242, 249 (5th Cir.1990); *Crisman v. Cooper Industries*, 748 S.W.2d 273, 276 (Tex.App.-Dallas 1988).

All of the causes of action in this case rely on the same theory of liability: the defective manufacture and design of the electrical system in the pylon. Therefore, the district court correctly determined that the only substantive issue for the purpose of conflicts analysis was the alleged design defect. *See e.g., Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex.1984).

2. The Most Significant Relationship Analysis

Restatement Section 6 contains the general principles involved in the conflicts analysis whereas Restatement Section 145 lists the factual matters to be considered when applying the Section 6 principles to a given case. *See Crisman v. Cooper Industries*, 748 S.W.2d 273, 276 (Tex.App.-Dallas 1988). The application of the most significant relationship test turns on the qualitative nature of the contacts rather than the quantity of the contacts outlined in the Restatement. *Id.* Because the place of injury is fortuitous, correct analysis should give more weight to each state's contacts with the design and manufacture of the electrical system than to the residential choices of the plaintiffs. *See Foster v. United States*, 768 F.2d 1278, 1282-83 (11th Cir.1985) (fortuitous nature of aircraft accident locale entitled place of injury factor to little weight in conflicts analysis); Restatement § 145, comment e.

Virtually all of the relevant conduct complained of took place in Georgia, with some possible activity by General Electric in Ohio. Georgia thus has the strongest

interest in applying its law to businesses that design, manufacture and sell products into its stream of commerce. Texas on the other hand, has its only relevant contacts with this case in the fact that many, but not all, of the plaintiffs are domiciled there. Because both the case law and the Restatement instruct us to place more emphasis on the place of the alleged misconduct, than on the residential preferences of scattered plaintiffs, the district court correctly concluded that Georgia law should apply.

B. *The Defendants Had No Duty to Warn*

In order to defeat the summary judgment, the plaintiffs must offer evidence tending to prove that the defendants knew about a danger created by the design of the wiring and that the failure to warn of that danger was the proximate cause of the injuries alleged. *See Talley v. City Tank Corp.*, 158 Ga.App. 130, 279 S.E.2d 264 (1981). However, there is no duty to warn a purchaser of a physical fact that is open and obvious, or of any potential risk which is equally known and appreciated by both the manufacturer and the purchaser. *Herschel McDaniel Funeral Home, Inc. v. Hines*, 124 Ga.App. 47, 183 S.E.2d 7, 9 (1971); *YMCA v. Bailey*, 112 Ga.App. 684, 146 S.E.2d 324 (1965); *Gibson v. Consolidated Credit Corp.*, 110 Ga.App. 170, 138 S.E.2d 77 (1964).

As discussed with respect to the government contractor immunity defense, the Air Force was so involved in the C-5A project it knew about the danger – if any – inherent in the circuit design. Therefore, the defendants

did not have a duty to warn the Air Force. We affirm the summary judgment against the plaintiffs on this claim.

V. LIMITATIONS ON DISCOVERY

A. *Standard of Review*

We review decisions regarding discovery for abuse of discretion. *Duke v. University of Texas*, 729 F.2d 994, 997 (5th Cir.), *cert. denied*, 469 U.S. 982, 105 S.Ct. 386, 83 L.Ed.2d 320 (1984).

B. *Number of Witnesses Permitted for Depositions*

The plaintiffs argue that this Court should reverse because the district court abused its discretion by limiting the number of witnesses they could depose on the liability issue to 16 for each side. The plaintiffs also want the opportunity to depose more witnesses on issues related to the claims that were not based on the original design of the C-5A. Limiting the number of deposition witnesses to sixteen for each side is not an abuse of discretion in this case. The plaintiffs actually deposed only 15 of their allotted 16 witnesses. Furthermore, we find nothing in the record to suggest that plaintiffs made a timely request to go back and look into issues that were unexamined in earlier discovery, or that plaintiffs were prejudiced by the limitation. The decision to limit deposition testimony to 16 witnesses for each side does not require reversal of this summary judgment.

VI. CONCLUSION

In sum, the defendants have come forward with sufficient evidence to support the assertion of the government contractor immunity defense, and the plaintiffs have failed to raise any genuine issue of material fact regarding that defense. In addition, the defendants did not have the duty to warn the Air Force of the danger – if any – created by the design of the electrical circuit because the Air Force knew as much as the defendants knew about the design of the circuit. Finally, the district court did not abuse its discretion by limiting each side to 16 depositions. The summary judgment for the defendants Lockheed and General Electric is affirmed.

AFFIRMED.

APPENDIX 2

Olga PEREZ, etc., et al. and David Edward Perez, et al., Plaintiffs-Appellants,

v.

LOCKHEED CORP. and General Electric Company, Defendants-Appellees.

No. 95-50091.

United States Court of Appeals,
Fifth Circuit.

July 5, 1996.

Plaintiffs brought action against manufacturers of military aircraft, following fatal crash of aircraft, on claims of negligence and products liability. The United States District Court for the Western District of Texas, Morey L. Sear, Chief Judge, granted summary judgment for defendants. The Court of Appeals, Goodwin, Circuit Judge, sitting by designation, 81 F.3d 570, affirmed. On plaintiff's petition for rehearing, the Court of Appeals denied petition but clarified prior opinion by holding that under Georgia law, manufacturers did not have duty to warn military or pilots of any danger in design of electrical circuits on aircraft.

Petition denied.

Appeal from the United States District Court for the Western District of Texas.

Opinion filed April 29, 1996,
81 F.3d 570 (1996).

Before POLITZ, Chief Judge, and GOODWIN[1] and DUHÉ, Circuit Judges.

PER CURIAM:

We clarify our panel opinion in this case by amending Section IV.B as follows:

B. *The Defendants Had No Duty to Warn*

In order to defeat the summary judgment, the plaintiffs must offer evidence tending to prove that the defendants knew about a danger created by the design of the wiring and that the failure to warn of that danger was the proximate cause of the injuries alleged. *See Talley v. City Tank Corp.*, 158 Ga.App. 130, 279 S.E.2d 264 (1981). However, there is no duty to warn a purchaser of a physical fact that is open and obvious, or of any potential risk which is equally known and appreciated by both the manufacturer and the purchaser. *Herschell McDaniel Funeral Home, Inc. v. Hines*, 124 Ga.App. 47, 183 S.E.2d 7, 9 (1971); *YMCA v. Bailey*, 112 Ga.App. 684, 146 S.E.2d 324 (1965); *Gibson v. Consolidated Credit Corp.*, 110 Ga.App. 170, 138 S.E.2d 77 (1964). The duty to warn extends to the ultimate user of a product. *See, e.g., White v. W.G.M. Safety Corp.*, 707 F.Supp. 544, 547 (S.D.Ga.1988), aff'd 891 F.2d 906 (11th Cir.1989).

We need not determine whether, under Georgia law, the Air Force or the pilots are the ultimate users of the C-5A. As discussed, with respect to the government contractor immunity defense, the Air Force was so involved

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[1] Circuit Judge for the Ninth Circuit, sitting by designation.

in the C-5A project it knew about the danger – if any – inherent in the circuit design. Therefore, the defendants did not have a duty to warn the Air Force. In addition, the defendants had no duty to give a warning to the pilots because the Air Force was a learned intermediary. *See, e.g., Stuckey v. Northern Propane Gas Co.*, 874 F.2d 1563, 1568-69 (11th Cir.1989) (manufacturer's duty to warn ultimate consumer is discharged where an intermediary party has knowledge of the danger). We affirm the summary judgment against the plaintiffs on this claim.

With this amendment, IT IS ORDERED that the petition for rehearing is DENIED. No active judge of the court or member of the panel has requested an en banc poll, the suggestion for rehearing en banc is also DENIED.

APPENDIX 3

AFFIDAVIT OF O.V. BRAUN

THE STATE OF GEORGIA §

COUNTY OF DeKALB §

I, O. V. BRAUN, am over eighteen (18) years of age and fully competent to make this Affidavit. The following matters are true and within my personal knowledge.

1. I was born at Syracuse, New York on August 11, 1928. I obtained a Bachelors of Science Degree in Industrial Engineering from Georgia Tech. in 1953. I started my career with Lockheed Corporation that same year. I joined the company as a price estimator in the Finance Department. I then worked as an Administrator in the C-130 Program before moving to the Industrial Engineering Section. I worked as an Industrial Engineer on various types of aircraft before transferring into the Chief Draftsman's office to work on drafting and engineering procedure manuals. I was then transferred to the C-5A Configuration and Data office where I became manager. I next moved into Contracts and where I negotiated with the Government on contracts dealing with the C-130, C-141, and C-5A. When the Military Contracts Department was created, I was assigned as Manager of Military Contracts. In that position, I was responsible for the negotiations and contract compliance on all military aircraft manufactured by Lockheed, including the C-5A. This included the negotiation of SA-1000 (as explained later). I was intimately familiar with the contractual requirements for the C-5A Program.

2. The C-5A Galaxy manufactured by Lockheed Aeronautical Systems Company is one of the world's largest cargo aircraft. It is capable of delivering to virtually any location in the world completely equipped combat units, support forces, and all types of supplies including large and heavy weapons and military vehicles. This includes such outsized items as the 74 ton mobile scissors bridge and the M1A1 Battle Tank.

3. Physically, the C-5A is 247.8 feet long and has wing span of 222.8 feet. It is powered by four TF39-GE-1C turbofan engines, manufactured by General Electric Company, rated at 43,000 pounds of thrust each. The maximum total takeoff weight at 2.25g is 840,000 pounds, with a maximum payload of 265,000 pounds. Its cargo hold is 19 feet wide, 13.5 feet high and 144.6 feet long for exceptionally large volumes of cargo.

4. The upper deck compartment of the C-5A has 73 seats available for equipment operators or other passengers. At destination, personnel are available immediately to drive the vehicles off the plane or otherwise operate equipment being delivered.

5. Without refueling, the C-5A can airlift 50 tons of men, women and supplies for 5,742 nautical miles or 76.5 tons for 5,000 nautical miles. With its air refueling capability, it has worldwide range.

6. Some of the outstanding airlift performances by the C-5A include a non-stop Chicago to Moscow flight with an 85 ton super conducting electromagnet; the delivery of 825 tons of equipment, tanks and helicopters to the besieged air base at Da Nang, Viet Nam, in 1972 in a span of only ten missions with an average ground time of only

32 minutes from touchdown to takeoff; a multi-aircraft, 14,000 mile round trip mission delivering a total 10,763 tons of cargo during the 1973 Israeli airlift; and the delivery of a 100 bed mobile hospital, purification units and communications equipment for relief operations in earthquake damaged Nicaragua in 1972. C-5A Galaxies, including the plane in question, and their C-5B sister ships, were instrumental in transporting men and material to and from the Middle East during Operations Desert Shield and Desert Storm. Most recently, C-5A Galaxies were used to delivery relief supplies to the newly independent states of the former Soviet Union and troops and supplies to support the United Nations' effort in Somalia.

7. The C-5A contract was negotiated and awarded under a then new procurement concept referred to as the "total package concept." The "total package" contract meant that Lockheed, as prime contractor, was responsible for the entire program of research, development, testing, production, and support of the C-5A Galaxy during the life of the contract and was required to work closely with, and under the surveillance of, Air Force engineers and Systems Management specialists in the course of developing the aircraft. The procurement process was initiated by the United States Air Force on October 14, 1964 when it issued Request For Proposal (RFP) No. 33-657-65-5027 entitled Request for Proposal for the Long Range Heavy Logistic Transport Support System (CX-HLS) System 410A. That RFP called for the development of a new, long range, heavy cargo airplane. The aircraft was to be the first of its kind and would be the largest aircraft in the world at the time of its development. The

RFP originated from the CX-HLS Program Office under the U.S.A.F. Deputy for Systems Management, Aeronautical Systems Division, Wright-Patterson AFB, Ohio.

8. The Air Force received competing proposals for the CX-HLS contract from Lockheed, Boeing, and McDonald-Douglas. (A fourth proposal featuring a large lighter-than-air-ship was rejected as non-responsive to the bid proposal.) As part of that competition, the U.S.A.F. System Program Office approved a Systems Specification for the CX-HLS, Systems Specification SS40001. That Systems Specification primarily contained the general performance, design, development, and test requirements for the aircraft.

9. In response to the RFP and Systems Specification, Lockheed-Georgia Company, a Division of Lockheed Aircraft Corporation (Lockheed), working closely with the United States Air Force engineers and other experts, prepared and submitted to the United States Air Force the Contract End Item Detail Specification for 410A Heavy Logistics Support Air Vehicle Contract End Item (CEI) CP40002 in April, 1968. That Specification was approved by the United States Air Force as documented by the signature of an Air Force official from the Systems Program Office charged with the responsibility of overseeing the development of the CX-HLS. The aircraft being developed was designated the "C-5A Air Vehicle" and was subsequently nicknamed the "C-5A Galaxy."

10. After careful evaluation of competing proposals the United States Air Force awarded a development contract for the 410A Heavy Logistic Support System to Lockheed based on what was to become known as the

C-5A Galaxy. The contract, AF33(657)-15053, was signed by Mr. Edward J. Trusela, Contracting Officer, on behalf of the United States of America on October 1, 1965. It was signed on behalf of Lockheed on September 9, 1965 by Mr. T. R. May, Attorney-in-Fact. A true and correct copy of Contract AF33(657)-15053 is attached hereto as Exhibit "A."

11. The contract covered virtually every aspect of the design and development of the C-5A aircraft and specifically required that it be developed in accordance with the System Specification No. SS40001, the CEI Specification CP40002, and the Interface Control Document 4AZAP00001. The Interface Control Document 4AZAP00001 was a document which coordinated the design of the C-5A aircraft with the design of the engines. The engines were being separately developed by competing manufacturers. The contract for the engines was eventually awarded to General Electric Company (GE) on October 6, 1965 and the TF39 engine was selected by the United States Air Force for use on the C-5A Galaxy. The engines were furnished to Lockheed by the United States Air Force, and they were developed and produced under separate United States Air Force contracts with General Electric Company.

12. The development of the C-5A Galaxy was, at all times, undertaken in accordance with and under the approval purveyance of the Air Force Systems Command and AFSCM 375-1. AFSCM 375-1 is entitled "Configuration Management During Definition and Acquisition Phases." It governed the initial design, manufacturing and acquisition of the C-5A Galaxy and delineated the involvement, approval authority and control vested in

the United States Air Force for the project. A true and correct copy of AFSCM 375-1 is attached hereto as Exhibit "B."

13. Contract AF33(657)-15053 initially provided for the development of five (5) Category I Flight Test Aircraft. The contract also contained the System Specification Number SS 40001C. The System Specification, in turn, contained the CP 40002 series of Contract End Item (CEI) detail specifications, which specified all "engineering critical components." The term "engineering critical component" equivalent items because of their importance to engineering management, complexity, performance, or critical nature with regard to the engineering aspects of the system/equipment development and production. The System Specification, Number SS 40001C and the CP 40002 series of (CEI) detail specifications were formally approved by Air Force's System Program Office.

14. Critical component specifications were developed under the contract and concurred with by the A.F. Procuring Contracting Officer (PCO) through an interactive process known as the Preliminary Design Review (PDR) and Critical Design Review (CDR). The PCO represented the United States Air Force and was the person with legal authority to commit the Government via a contractual instrument.

15. The components that required a critical component specification were listed in the specification of the Contract End Item (CEI) of which they are a part. The United States Air Force thereby controlled the list of critical components. Otherwise, management control of components was accomplished by the contractor until the

component specification was formally approved. The critical component specification was approved at the time the CEI in which it was installed was accepted as qualified and the test data supporting the qualification was delivered. A critical component was required, from the time of formal approval, to be maintained by Specification Change Notices (SCNs) and/or specification revisions as directed by the United States Air Force. SCNs for critical component specifications affected by a Class I engineering change had to be submitted as part of an Engineering Change Proposal (ECP) package for formal approval before a change could be incorporated into the CEI.

16. Any change or revision in a part or a specification which had been formally approved, whether he change was proposed by Lockheed, a Government agency, or some third party had to be documented and formally approved.

17. The Contract AF33(657)-15053 also provided for the manufacture and delivery of fifty-three (53) C-5A Galaxies in Fiscal Years 1967, 1968 and 1969. By Supplemental Agreement No. 235 to Contract AF33(657)-15053, the United States Air Force requested and contracted for delivery of fifty-seven (57) additional C-5A Galaxies during Fiscal Years 1970, 1971 and 1972.

18. All services provided under the contract were subject to continuous United States Air Force monitoring and inspection, including the design and verification of testing of designated aircraft components. In accordance with the contract, all services required to produce aircraft

were inspected and accepted by the United States Air Force.

19. These services included preparation of engineering analyses, drawings required to fabricate parts and specifications for components to be purchased from other sources. Process specifications were also developed to provide manufacturing departments with instructions for fabricating various aircraft components.

20. All of the detailed design specifications, drawings and sub-contract specifications were reviewed and approved by the United States Air Force in accordance with the contract. All designs were submitted for approval during Preliminary Design Reviews (PDR) and later subjected to Critical Design Reviews (CDR). The United States Air Force regularly required revisions of the proposed design and ultimately approved the design only after the revisions were incorporated into the design by Lockheed. Lockheed routinely interacted with United States Air Force experts and engineers during those reviews. First Article Compliance Inspections (FACI's) were conducted by the Air Force on each part of the aircraft as they were manufactured. The manufactured part was checked physically and against the engineering drawings to confirm compliance with design specifications.

21. The C-5A Galaxy which was involved in the accident near Ramstein Air Base, Germany on August 28, 1990 was aircraft number LAC 0031 (Lockheed Serial Number) and United States Air Force serial number AF68-0228. That aircraft was designed and manufactured under Contract AF33(657)-15053, and was delivered to

the United States Air Force on January 9, 1971. A true and correct copy of DD Form 250 accepting delivery of that aircraft and certifying that it complied with the applicable specifications is attached hereto as Exhibit "C."

22. During the first part of 1971, a series of negotiations took place between the United States Air Force and Lockheed resulting in a Supplemental Agreement to the contract which became effective on May 31, 1971. This Supplemental Agreement added additional governmental management controls and reduced the total number of aircraft to be produced to eighty-one (81). The Supplemental Agreement (Modification No. 1000-D) because known as Supplemental Agreement No. 1000 to Contract AF33(657)-15053 (hereinafter SA-1000). A true and correct copy of SA-1000 is attached hereto as Exhibit "D". SA-1000 superseded and replaced the original contract and was retroactive in effect.

23. Throughout the C-5A program, the United States Air Force imposed extensive testing of all aircraft components and systems, pursuant to the contract. The Air Force required Lockheed to develop detailed test plans which were reviewed and approved by the Air Force before testing was accomplished. Tests were then conducted and the results were reviewed and approved by the Air Force. These tests were completed in order to comply with the quality assurance requirements delineated in the System Specification No. SS 40001, CEI Specifications CP40002, Military Specifications and Critical Component Specifications. These tests were conducted by the system contractor. The United States Air Force participated, evaluated, and assisted in the control of most of the systems tests through the System Program Office.

24. The Air Force would not accept such components unless they passed the appropriate tests conducted according to United States Air Force approved tests plans and test procedures. United States Air Force inspectors were also on site during the development and manufacture of each C-5A Galaxy to insure quality control and specification compliance. FACI's were conducted on each part of the aircraft. Those inspectors did not conduct merely *pro forma* inspections or "rubber stamp" the manufacturer's data. They enforced strict quality control through genuine inspection of product and procedure, including the monitoring of acceptance tests.

25. In addition to the United States Air Force involvement in the actual testing and verification of quality requirements, the overall quality system in place at Lockheed was also audited and approved by the United States Air Force in accordance with the Handbook – H50 "Evaluation of a Contractor's Quality Program." (H50) A True and correct copy of the H50 is attached hereto as Exhibit "E." Furthermore, H50 also required that the government representative be responsible for determining that contractual requirements have in fact been complied with prior to the acceptance of the product and that the final decision of product acceptability was solely the responsibility of the government.

26. The Preliminary Design Review (PDR) No. 11 for the nacelle, pylon, and thrust reverser took place in Chula Vista, California on June 3 - 6, 1967. Initial Air Force approval of the design was given following that PDR. Critical Design Review (CDR) No. 3 for the nacelle, pylon, and thrust reverser took place in Chula Vista, California on November 7 - 9, 1967. After careful review

of the data submitted at the CDR, the Air Force asked for a second meeting to address specific aspects of the design. The meeting, designated CDR No. AC-3, was held at Lockheed on February 28 and March 1 and 2, 1968. Air Force personnel were also invited to attend the subsequent Production Item Configuration Inspection (PICI) at the General Electric Production Plant at Evendale, Ohio to assure conformance of the thrust reverser parts and assemblies to United States Air Force specifications. Following the design reviews and configuration inspection described, the United States Air Force again approved the design of the C-5A Galaxy nacelle, pylon, and thrust reverser components and assemblies.

27. The "Rollout" of the first C-5A Galaxy took place on March 2, 1968 at the Lockheed plant in Marietta, Georgia. President Lyndon B. Johnson attended the ceremony. The first flight took place later that year on June 30, 1968.

28. Testing of the C-5A Galaxy took place in accordance with the contract. Combined Category I and II Flight Tests were conducted as part of the Flying Qualities Test Program for the C-5A aircraft. Most of these tests were conducted on ship LAC 0001 (USAF serial number 66-8303). The first tests were conducted jointly by USAF personnel and Lockheed personnel at the Air Force Flight Test Center (AFFTC) at Edwards AFB, California from August 17, 1969 through January 19, 1970. Stability and control tests were conducted on ship LAC 0002 (USAF serial number 66-8304) during the Air Force Preliminary Evaluation (AFPE) in July and August of 1969. Tests including pitch upset, dive and most lateral control tests with the augmentation system disabled were conducted

on ship LAC 0003 (USAF serial number 66-8305) at Marietta, Georgia in November and December of 1969. Performance and results of these tests are reflected in Report No. LG1T19-1-10 dated June 1970 and entitled C-5A category I/II Engineering Flight Test Flying Qualities Test Results which is signed and approved by Col. Thomas J. Cecil, USAF, Commander, 6512 Test Group, and by Brigadier General Robert M. White, USAF, Commander, AFFTC. A true and correct copy of Report No. LG1T19-1-10 is attached hereto as Exhibit "F."

29. From time to time, Lockheed has made recommendations to, and received recommendations from, the United States Air Force relating to design changes on the aircraft and/or its components. When a change was considered desirable by Lockheed, or when a change was requested by the United States Air Force, the respective engineers would prepare an Engineering Change Proposal (ECP) and submit it to the United States Air Force for approval. The United States Air Force would review and evaluate the design change in terms of its product improvement, safety, cost feasibility and practicality. If the ECP was accepted, the United States Air Force would define in the ECP the work that would be done, when it would be done and who would do it. The United States Air Force accepted some ECPs and disapproved others. ECPs that were accepted were incorporated into each airplane in the fleet. This insured that all C-5As in the Air Force were the same. No change to the design of the aircraft or its components could be made by Lockheed without United States Air Force approval.

30. The United States Air Force, United States Air Force Reserves, and Air National Guard are currently the

only entities operating C-5 Galaxy aircraft. The United States Air Force, therefore, is one of the most knowledgeable organizations regarding the aircraft operations. The United States Air Force and is reserve components are solely responsible for the maintenance of the C-5A fleet. Furthermore, the United States Air Force was made aware of the risks that were known to Lockheed during the design of the C-5A Galaxy. Lockheed went to great lengths to identify and evaluate potential hazards as evidenced by the LG1T10, LG1T20, LG1US281, LG1US284, LG1US285, LG1US287, and LG1US288, series of documents and also, including but not limited to, numerous failure mode effects and fault analyses. Those documents were submitted, in the form of Engineering Reports, to the United States Air Force System Program Office (SPO). Further details that are included in these reports are, the likelihood of occurrence, hazard severity, failure predictability and the consequences of failures.

31. The C-5A Galaxy is a safe, reliable aircraft. It has served this country well since 1969, in peace time and in war. It was the backbone of Operation Desert Shield and Operation Desert Storm, along with the C-5B, moving millions of tons of men, women, equipment, ammunition and supplies to and from the Middle East. Indeed, the last flight of the plane in question was part of that effort. To date, of the eighty-one (81) C-5As delivered to the United States Air Force, only five (5) have been attrited from the fleet. (Three of these were lost to accidents on the ground.) The C-5A was conceived to be the best possible way to move massive amounts of people, machines, and cargo over long distances at jet airplane speeds. It has proven to be exactly that. It was designed

and built under Air Force surveyance and in accordance with the detailed specifications approved by the United States Air Force. It complied with those specifications. After over twenty (20) years of service experience, Lockheed is aware of no dangers in the design of the aircraft which were not known by the United States Air Force at the time it approved the design or which did not become known to the United States Air Force during its operation of the aircraft. Lockheed is proud of the C-5A Galaxy and is service to this country.

Further, Affiant sayeth not."

/s/ O. V. Braun
O. V. BRAUN

Title: Manager of Military, Contracts, RET.

SWORN and SUBSCRIBED to before me on this the 20th day of October, 1993 by O. V. BRAUN.

/s/ Wynette Cheek
Notary Public in and for
Fulton County, Georgia
My Commission expires:
Nov. 14, 1994

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE AIR DISASTER AT RAMSTEIN	MDL DOCKET
AIR BASE, GERMANY, ON	No. 5-92-MD-919
AUGUST 29, 1990	ALL CASES

AFFIDAVIT

THE STATE OF GEORGIA §
COUNTY OF COBB §

"I am Carl H. Weaver. I am over the age of eighteen (18) and fully competent to make this Affidavit. The facts set forth herein are true and of my personal knowledge.

Lockhead Aeronautical Systems Company (LASC) formerly known as Lockheed-Georgia Company, is a division of Lockheed Corporation. Its principal offices and manufacturing facilities are in Marietta, Georgia.

LASC manufactures aircraft in Marietta, Georgia for the United States Government, foreign governments and commercial companies. These aircraft include the C-130 Hercules, the P-3 Orion, and the F-22, the United States' newest jet fighter.

LASC employs approximately 12,400 people in Marietta and has been in continual operation there, either as LASC or a predecessor, since 1951.

The C-5A Galaxy and C-5B Galaxy aircraft were designed and manufactured by Lockheed-Georgia/LASC

at Marietta, Georgia. All C-5As and C-5Bs were sold to the United States Air Force. The Air Force Plant Representative Office (AFPRO) inspected and accepted delivery of all C-5 Galaxies in Marietta, Georgia.

The "Rollout" of the first C-5A Galaxy took place on March 2, 1968 at the Lockheed plant in Marietta, Georgia. The first flight took place there in 1968. The last C-5B Galaxy was delivered to the Air Force in 1989. Engineering support and some heavy maintenance of the C-5A and C-5B fleet is provided under contract to the United States Air Force by Lockheed through Lockheed's C-5 Program Director whose office is in Marietta, Georgia.

The C-5A Galaxy which was involved in the accident near Ramstein Air Base, Germany on August 28, 1990 was identified as LAC0031 (Lockheed Serial Number) and United States Air Force Serial Number AF68-0228. That aircraft was designed and manufactured by Lockheed Georgia/LASC, under contract with the United States Air Force, in Marietta, Georgia. It was delivered to the Air Force on January 9, 1971 in Marietta, Georgia.

In 1978 and 1979, LASC designed and manufactured, at the request of the United States Air Force, kits which were used to modify the pylons of C-5A Galaxies. Aircraft AF68-0228 had been modified with the installation of that kit prior to the accident. Among other pylon modifications the kits included wiring harnesses and grounding bus bars for the pylon electrical system which, in turn, included the electrical wiring and grounding studs for the thrust reversers and cockpit indicator lights for the thrust reverse system. These kits were also designed and manufactured in Marietta, Georgia.

Further, Affiant sayeth not."

/s/ Carl E. Weaver
(Signature)

Carl E. Weaver
(Name Typed or Printed)

SWORN AND SUBSCRIBED to before me on this 10 day of March, 1993 by Carl H. Weaver.

/s/ Janie G. Bendock
Notary Public in and for Georgia
My Commission expires: 4-11-95

Supreme Court, U.S.
FILED
DEC 5 1996
CLERK

No. 96-550

In The

Supreme Court of the United States

October Term, 1996

SIGRID CHASE, DEBORAH CLEYMAN, JUDY GORDON, SULEMA R. VILLARREAL, ELVIRA HERRERA, SUSAN JEAN PRICE, SYLVIA GARZA, individually and in their representative capacities; BARBARA KNUTSON, DAVID EDWARD PEREZ, JOSEPH MANUEL PEREZ, JOHN PAUL PEREZ, DANIEL RICHARD PEREZ, individually; and ESTHER PEREZ, as next friend and guardian of JAMES PEREZ, a minor,

Petitioners,

vs.

LOCKHEED CORPORATION and GENERAL ELECTRIC CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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LIST OF INTERESTED PARTIES

Petitioners refer the Court to the List of Parties and List of Interested Parties set forth, respectively, at pages ii and iii of the Petition for Writ of Certiorari, and page ii of Respondents' Brief in Opposition.

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I.

ERRONEOUS APPLICATION OF *BOYLE*

The Fifth Circuit's decision upholds the summary judgments entered in favor of Respondents on all of Petitioners' claims. Respondents' defense of this decision ignores the settled rule that the facts and all reasonable inferences from the facts must be viewed in the light most favorable to the parties opposing summary judgment, Petitioners herein. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

For example, Respondents erroneously argue that there was no evidence that a single point electrical failure in one of the C-5A's thrust reversers led to an inadvertent and undetected deployment of a thrust reverser on take-off. (Respondents' Brief, at 11-12). Suffice it to say here that the district court itself expressly credited the Petitioners' theory of causation and the abundant expert testimony and other evidence submitted by Petitioners on this point:

> *Plaintiffs have presented affidavit and deposition testimony which indicates that the accident may have been caused by the design of the parts contained in ECP 7054.*
>
> * * *
>
> The ground wires for both the thrust reverser enunciator circuit and the thrust reverser indicator lights circuit were terminated to a single ground point. Consequently, *if that single point malfunctioned, the thrust reverser system could remain in an unlocked position without the cockpit crew being aware of it, which could in turn lead to an uncommanded deployment of the system.*
>
> * * *
>
> *Plaintiffs* also assert that the single point ground design of the thrust reverser system caused the crash and *have provided evidence of this.*

(R. 2404-2406).[1] Respondents' "no causation" argument simply does not bear scrutiny on this record.[2]

Respondents likewise improperly slant the summary judgment record in their favor in arguing that the evidence was supposedly "unrebutted" that the challenged single point ground design "complied with specifications provided or approved by the Air Force . . . ," that Lockheed did not alter GE's original design, and that the testimony from GE's witnesses which Petitioners refer to in the Petition relate to a different part of the C-5A's electrical system. (Respondents' Brief, at 12-13, 20).

As was explained in the Petition, GE originally designed the thrust reversers with *two* separate grounds for the enunciator and indicator circuits precisely to avoid a single point failure. However, Lockheed inexplicably attached the two ground wires for the two circuits to a *single* grounding stud when it assembled the crash aircraft and other C-5A's. (Petition, at 4-5, 7-8). Contrary to Respondents' unsupported assertions, the evidence on this issue was crystal clear.

William Gullick, a former GE employee who also was retained as one of its experts in this case, responded as follows to Petitioners' contention that the single point ground design was defective:

> Criticism has been made of the fact that pins 1 and 2 are grounded at the same grounding stud. *The [GE] design of the thrust reverser control system did not contain a common ground but instead specified dual grounds, one for the operating [enunciator] circuit and one for the indicating circuit.*

(R. 940).

Dr. Fred Gilliam, another GE expert, echoed Mr. Gullick's testimony that Lockheed had in fact altered GE's

---

[1] All emphasis has been supplied by counsel.

[2] For that matter, even the Air Force believed that a single point failure caused the crash. (R. 2175, reverse side; 2179; 2189, reverse side).

original design of this crucial safety feature and further suggested that Lockheed's alteration violated the specifications:

> The only qualification relevant to the conclusion of the preceding paragraph [i.e., that the design was "in full compliance with each set of specifications"] involves the *"as installed"* electrical system and the *variance* between it and the electrical system as designed by GE. *Combining the ground wire for the solenoid [enunciator] circuit with the ground wire for the thrust reverser indicator lights circuit at a point between the pylon connector and the engine connector creates a "common ground" for these two circuits. This common ground was not part of General Electric's design for the thrust reverser system. I don't know the rationale for creating this common ground, but the apparent result is a reduction in the fault tolerance of the system.*

(R. 947-48).

This evidence, of course, is in complete accord with GE's post-accident letter to the Air Force regarding GE's original dual ground design and Lockheed's unilateral alteration of the same (quoted at page 16 of the Petition), as well as the following deposition testimony from the author of that letter:

> Q . . . Was GE required to design the electrical system of the thrust reverser system so that it would not have a single point failure mechanism in it?
>
> A It stated – we met the design requirements as specified in that particular document [i.e., Specification 41060].
>
> * * *
>
> Q I'm only interested, sir, as to single point failure mechanisms. You complied with that – that was a prohibition by the specifications, was it not?

A Yes.

* * *

Q . . . I want you to assume that General Electric had designed – pursuant to 41060 had designed a system, this system we've been talking about, which provided for two wires to one ground for the thrust reverser indication lights. Would that be a violation of the safety provisions of this particular contract?

A In my opinion, if we run two circuits into one ground pin, it would have been a violation of the requirements of this document.

* * *

If we [GE] provided and hooked up both of them into one pin, in my opinion we would not have met the specification as its written in the spec.

(Petitioners' App., at 37-40).

GE witnesses furthermore testified that GE did not learn until after the C-5A crashed that Lockheed had altered GE's original dual ground design which complied with the governing specifications (Petitioners' App., at 42, 46), and there was no evidence that Lockheed had informed the Air Force of its decision to change GE's design.

The evidence on summary judgment thus was that a single point ground failure caused the crash of the C-5A, GE's original design of the thrust reverser's electrical circuitry included dual grounds to prevent such a failure, Lockheed altered GE's original design without telling either GE or the Air Force, and Lockheed's alteration violated the governing specifications.

In light of the foregoing, Respondents' contention that the Fifth Circuit's application of the government contractor defense is consistent with *Boyle v. United Technologies*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), collapses along with the faulty foundation upon which it is based. The government contractor defense is

rooted in governmental exercise of *discretion*. (See Petition, at 10-19). The Fifth Circuit's conclusion that *Boyle's* first condition was met should not be permitted to stand since there was no evidence that the Air Force substantively reviewed and thereafter approved Lockheed's design of the thrust reverser's electrical circuitry knowing that Lockheed had altered GE's design. The Fifth Circuit's conclusion that *Boyle's* second condition was met should not be permitted to stand because Lockheed's altered design did not comply with the governing specifications. The Fifth Circuit's conclusion that *Boyle's* third condition was met should not be permitted to stand because there was no evidence that Lockheed informed the Air Force, prior to the crash, that Lockheed had altered GE's original design which complied with the specifications. (See Petition, at 12-19). The Petition should be granted.

II.

UNCONSTITUTIONAL CHOICE OF LAW

Respondents' arguments on the lower courts' choice of law are without merit and also fail to address the central issue under this point this point – i.e., whether the *total lack of contacts* between Petitioners and their decedents and the state of Georgia rendered the choice and application of Georgia law fundamentally unfair. As previously detailed, the Fourteenth Amendment's due process clause surely prohibits the choice of law of a state with which the adversely affected party has no contacts whatsoever. (Petition, at 20-23). Because this constitutional question was decided below in a way that conflicts with decisions of this Court, or the law is in dire need of further clarification, the Petition should be granted.

Respondents make a number of unsupported assertions before engaging in their superficial analysis of the choice of law issues. Respondents' contention that Petitioners waived their due process argument is untenable

for a myriad of reasons. First, Petitioners specifically raised the issue in the district court and then again on appeal. (R. 2370). Second, constitutional fairness is part and parcel of any choice of law analysis and was preserved by Petitioners' timely opposition to Respondents' motion to apply Georgia law. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-823, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Jaurequi v. John Deere Co.*, 986 F.2d 170, 173 (7th Cir. 1993). Third, the Fifth Circuit expressly acknowledged in its opinion that the "most significant relationship" test adopted in Texas and Florida is *"subject to constitutional constraints."* (Petitioners' App., at 16). Fourth, because a pure question of law is involved, appellate courts maintain discretion to address the matter and especially where the deprivation of constitutional rights results in a miscarriage of justice. *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *United States v. One Single Family Residence*, 13 F.3d 1493, 1498 (11th Cir. 1994). And fifth, this Court clearly has discretion to consider the due process issue in deciding whether to grant the Petition. *D.L. Thomas v. American Home Products, Inc.*, ___ U.S. ___, 117 S.Ct. 282, 283, ___ L.Ed.2d ___ (1996) (J. Scalia, concurring); Sup. Ct. R. 10.

Respondents' characterizations of the evidence and the Fifth Circuit's choice of law holdings are similarly flawed. It is undisputed that the *prototype* pylon kit used in kit proofing the crash aircraft and other C-5A's was directly delivered to the Air Force in Texas and not Georgia. (R. 706). Further, and significantly, nowhere on the face of the Fifth Circuit's opinion does the court hold that Petitioners' strict liability and negligence claims are governed by and barred by the Georgia statute of repose. Under part III of the opinion, the only stated basis for the affirmance of the dismissal of these claims was the government contractor defense. Because Petitioners' failure to warn claims survived this immunity defense, the Fifth Circuit under part IV of the opinion determined which

state's law applied to the failure to warn claims.[3] There is no discussion in the Fifth Circuit's choice of law analysis regarding Georgia's statute of repose or any alleged Georgia state interest in that enactment which, on its face, does not apply to extra-territorial accidents and which, pursuant to the *lex loci* test, has never been applied by Georgia courts to actions for injuries sustained outside of Georgia. (Petitioners' App., at 17-18). Ga. Code Ann. §51-1-11.

To the extent the Fifth Circuit's opinion could somehow be interpreted as sanctioning the choice and application of Georgia's statute of repose to "destroy" Petitioners' product liability actions, however, the deprivation of Petitioners' due process rights is even more glaring. *Wright v. Robinson*, 426 S.E.2d 870, 872 (Ga. 1993). Based on the choice of law constraints set forth in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981), lower courts have consistently found it unconstitutional to apply a state statute to a party who has no connection or contacts with that state. *E.g., In re Prudential Secs. Inc. Limited Partnerships Lit.*, 930 F. Supp. 68, 83 (S.D. N.Y. 1996); *Campbell v. Arco Marine, Inc.*, 50 Cal. Rptr.2d 626, 632 (Ct. App. 1996). Here, the Georgia statute of repose did not even exist at the time Respondents originally manufactured, designed and sold the C-5A to the Air Force. Georgia's domestic legislation cannot be applied to Petitioners' claims without abrogating the most fundamental of due process rights.

Respondents' additional argument that application of the "most significant relationship" test "automatically provides the requisite guarantees under due process" is equally unconvincing. Following Respondents' logic, once a court properly enunciates this test, the actual choice and application of law thereunder can never be

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[3] The Fifth Circuit had noted earlier that the district court erroneously found that the Georgia statute of repose barred the failure to warn claims. (Petitioners' App., at 7 n.6).

constitutionally challenged. Clearly, the due process constraints must be separately considered. *See Blane v. American Inventors Corp.*, 934 F. Supp. 903, 909-910 (M.D. Tenn. 1996) (analyzing constitutionality of applying Tennessee law after court chose that state's law under "most significant relationship" test); *see also Soo Line Railroad Co. v. Overton*, 992 F.2d 640, 643-645 (7th Cir. 1993) (finding application of Minnesota law unconstitutional even though choice of law analysis satisfied state rules); *United States v. 105,800 Shares of Common Stock of Firstrock Bancorp., Inc.*, 825 F. Supp. 191, 193-194 (N.D. Ill. 1993) (finding imposition of Delaware law unconstitutional even if state conflict-of-law rules dictate that Delaware law governs).

Respondents' contention that Petitioners do not directly challenge the lower courts' determination that Georgia had the "most significant relationship" is both incorrect and irrelevant. Petitioners have demonstrated in great detail that Texas had far and away the most significant contacts and state interests to the parties and occurrences in this case. (Petition, at 26-27). Indeed, Respondents conveniently ignore that Respondents themselves moved to consolidate and transfer these cases to *Texas* precisely because of Texas' significant contacts. 28 U.S.C. §1407(a). Respondents had every opportunity to transfer the action to a Georgia district court if they truly believed Georgia had the most substantial nexus to the issues in this action.[4]

In any event, the federal issue which this Court can and should decide is not whether the lower court chose

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[4] *See In re Swine Flu Immunization Products*, 446 F. Supp. 244, 247 (Jud.Pan.Multi.Lit. 1978); *In re Sundstrand Data Control, Inc.*, 443 F. Supp. 1019, 1021 (Jud.Pan.Multi.Lit. 1978); *In re Air Crash Disaster at John F. Kennedy Int.*, 407 F. Supp. 244, 245 (Jud. Pan.Multi.Lit. 1976) (all transferring cases to districts where no action was pending since transferee districts had greatest connection to cases).

the correct law under the applicable state choice of law rules but whether the choice of Georgia law exceeded constitutional limitations. And on this point, Respondents fail to grasp – and indeed have wholly failed to address – that due process requires that the adversely affected party have some contacts with the state whose law is chosen. As the text writers have put it, the chosen state must have "legislative jurisdiction." (Petition, at 20-26). *See also Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 165 n.56 (3d Cir. 1980), *rev'd on other grounds*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981) (citing "Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 Cornell L.Rev. 94, 103 (1976) (forum must have reasonable due process basis for applying own law, which does not exist if party opposing application of forum's law has no minimum contacts with forum. . . . ")); *cf. Blane*, 934 F. Supp. at 910 (finding application of Tennessee law constitutional where adversely affected parties had direct and adequate contacts with Tennessee).

Finally, Respondents' speculative assertions regarding Georgia's *lex loci delicti* doctrine and German law miss the mark entirely. That Georgia courts undoubtedly would have rejected the application of Georgia substantive law (including the statute of repose) had Petitioners filed suit there demonstrates the lack of any "state interest" under this Court's due process analysis. *See Phillips*, 472 U.S. at 818. Respondents' argument that it is "far from clear" whether Georgia law would have been applied due to the "public policy exception" also is unavailing. Georgia courts have consistently held that extra-territorial airplane crashes are not governed by substantive Georgia law and irrespective of whether Georgia law would have provided immunity.[5] Respondents have

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[5] *See Yates v. Lowe*, 348 S.E.2d 113, 113-114 (Ga. App. 1986); *Risdon Enterprises, Inc. v. Colemill Enterprises, Inc.*, 324 S.E.2d 738, 740-741 (Ga. App. 1984) (distinguishing *Baltimore Football Club, Inc. v. Lockheed Corp.*, 525 F. Supp. 1206 (N.D. Ga. 1981)); *see*

failed to cite a single case which has not followed the *lex loci* test. Further, Respondents' suggestion that German law may not provide an injured party with a strict liability claim hardly supports use of the public policy exception. Since Georgia's statute of repose altogether nullifies a plaintiff's cause of action, German law undoubtedly could not be any more restrictive or harsh.

CONCLUSION

Based on the facts and authorities set forth herein and in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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also Brooks v. Eastern Air Lines, Inc., 253 F. Supp. 119, 120-121 (N.D. Ga. 1966).